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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 22

UNITED STATES OF AMERICA AND BORG-WARNER CORPORATION (Detroit Gear Division), APPELLANTS,

vs.

CITY OF DETROIT, A MUNICIPAL CORPORATION.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

Filed October 8, 1956

Probable Jurisdiction Noted January 14, 1957

(File Endorsement Omitted)

IN THE SUPREME COURT

OF THE STATE OF MICHIGAN

Appeal from the Circuit Court for the County of Wayne
Honorable Herman Dehnke, Circuit Judge

(By Assignment)

No. 46,702.

UNITED STATES OF AMERICA and BORG-WARNER CORPORATION (Detroit Gear Division), an Illinois Corporation, *Co-Plaintiffs and Co-Appellants,*

v.

CITY OF DETROIT, a Municipal Corporation, *Defendant and Appellee.*

Record on Appeal—Filed December 12, 1955

GLENN M. COULTER,
Attorney for Borg-Warner Corporation (Detroit Gear Division), an Illinois Corporation, Co-Plaintiff and Co-Appellant,
1703 Ford Building, Detroit 26, Michigan.
FRED W. KAESS, United States Attorney,
JOHN L. OWEN, Assistant United States Attorney,
Attorneys for United States of America, Co-Plaintiff and Co-Appellant,
869 Federal Building, Detroit 31, Michigan.
PAUL T. DWYER, Corporation Counsel,
BERT R. SOGGE, Assistant Corporation Counsel,
JULIUS C. PLISKOW, Assistant Corporation Counsel,
Attorneys for City of Detroit, a Michigan Municipal Corporation, Defendant and Appellee,
1010 City-County Building, Detroit 26, Michigan.

2 IN CIRCUIT COURT OF WAYNE COUNTY

Declaration of Plaintiffs—Filed September 14, 1954

Come now the United States of America, by its attorneys, Fred W. Kaess, United States Attorney, and John L. Owen, Assistant United States Attorney, who allege that this action is brought by the United States Attorney,

for the United States of America at the direction of the Attorney General of the United States to unite with Borg-Warner Corporation (Detroit Gear Division), an Illinois corporation, co-plaintiff, in the obtaining of the relief sought herein for the use and benefit of the United States of America, and Borg-Warner Corporation (Detroit Gear Division), an Illinois corporation, by its attorney, Glenn M. Coulter, co-plaintiff herein, filing this declaration as commencement of suit, and say:

1. That plaintiff, Borg-Warner Corporation (Detroit Gear Division), an Illinois corporation, is, and at all times hereinafter mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of Illinois and is duly licensed and admitted to do business within the State of Michigan. Defendant, City of Detroit, is a municipal corporation, being a political subdivision of the State of Michigan, and located in the County of Wayne of said State of Michigan.

2. On the 6th day of February, A.D. 1954, plaintiff, Borg-Warner Corporation (Detroit Gear Division), an Illinois corporation, received from the Board of Assessors of said City of Detroit a notice that real property located at 11111 French Road, Detroit, Michigan, has been placed on the 1954 personal property assessment rolls for a total assessment of $352,060.00. Subsequent thereto and prior to July 1, 1954, plaintiff, Borg-Warner Corporation (Detroit Gear Division), an Illinois corporation, received a general city tax bill from the said City of Detroit, assessing against it as a personal property tax for the fiscal year 1954, and based upon the aforedescribed assessment, a total school and city tax in the amount of $12,323.50. Said tax bill recites that the tax so levied was assessed under the provisions of Act 189, Public Acts of 1953, of the State of Michigan.

3. On August 16, 1954, plaintiff, Borg-Warner Corporation (Detroit Gear Division), an Illinois corporation, paid to Charles N. Williams, Treasurer of the City of Detroit, the amount of $6,161.75, representing one-half of the aforedescribed total 1954 tax assessed, said payment being made under written protest which accompanied the check in payment thereof. A copy of said tax

bill, the check of plaintiff, Borg-Warner Corporation (Detroit Gear Division), an Illinois corporation, in payment of said amount of $6,161.75, and the written protest which accompanied said payment are attached hereto and made a part hereof as plaintiffs' Exhibits 1, 2, and 3, respectively, of this declaration; plaintiffs showing that such protest was in writing signed by a duly authorized agent and officer of Borg-Warner Corporation (Detroit Gear Division), an Illinois corporation, and specified the grounds for such protest of the tax in question.

4. Plaintiffs show unto this Court that prior to the 1st day of January, 1954, and on and ever since said date, the full and absolute title and ownership to the real property and buildings located thereon at 11111 French Road, Detroit, Michigan, so assessed, as described above, was in the United States of America, one of the plaintiffs herein.

5. Plaintiffs show that on January 1, 1954, and ever since that date, Borg-Warner Corporation (Detroit Gear Division), an Illinois corporation, has been in possession of said premises at 11111 French Road, Detroit, Michigan, solely as a lessee for a term of years under the provisions of a written lease between the United States of America and Borg-Warner Corporation (Lease No. (R)-60040) dated March 8, 1948, said lease having been amended by written amendment thereto dated December 1, 1952. Plaintiffs show that other than the leasehold interest under the provisions of said written lease as amended, Borg-Warner Corporation (Detroit Gear Division), an Illinois corporation, has no ownership of any nature in such real property or buildings so assessed by the City of Detroit.

6. Plaintiffs show that under the terms and provisions of the first amendment to the aforedescribed lease between the plaintiffs hereto, said amendment being dated December 1, 1952, there was added the following provision to said lease (amending Article 6—Rent):

"Provided, further, that, effective March 8, 1954, and throughout the remaining term of the extended

lease, Borg-Warner shall deduct and pay from the stipulated semi-annual rental installments any taxes assessed against it under the provisions of Public Act 189 of the State of Michigan for the year 1953 or other taxation statutes coming into effect during the extended term of the lease and which attempt to tax Borg-Warner on the basis of the assessed value of the Facilities leased to it or on the basis of the value of its leasehold interest therein or for any other reason because of its use and occupancy of the same under this lease. Borg-Warner will pay the personal taxes assessed against its own property located in said Facilities. The Government reserves the right to contest the legality of said Public Act 189 or any other of such described taxation statutes coming into effect during the extended term of the within lease, and, should it successfully do so, Borg-Warner shall repay to the Government any taxes actually refunded by such determination. Borg-Warner agrees to cooperate with the Government in respect to such possible litigation, including the payment of such taxes under protest, if so required by the Government."

Plaintiffs show that on the 7th day of September, 1954, plaintiff Borg-Warner Corporation (Detroit Gear Division), an Illinois corporation, deducted from a rental payment made under said lease to the United States of America the sum of $6,461.75, in accordance with the above quoted provision of the amendment to said lease.

7. Plaintiffs show that the aforedescribed tax levied on the land and buildings leased by it at 11111 French Road, and assessed thereto, is illegal, and that plaintiffs should be entitled to recover the amount so paid on August 16, 1954, for the following reasons (all of which are recited in plaintiff Borg-Warner Corporation's (Detroit Gear Division), an Illinois corporation, written protest dated August 16, 1954, which accompanied payment of said tax):

(a) The assessment by the City of Detroit as described above violates and is repugnant to the provisions

of the Constitution of the United States and the Constitution of the State of Michigan, and is therefore invalid, void and illegal, because at the date of such assessment (January 1, 1954) and ever since said date, the real estate and buildings so assessed was and are owned solely by the United States of America, and such
6 real property and buildings thereon were at the date of said assessment and ever since wholly exempt and immune from taxation by the City of Detroit.

(b) The aforedescribed tax was levied and authorized by Act 189, Public Acts of 1953 of the State of Michigan (Michigan Statutes Annotated 7.7 (5)), which provides as follows:

"(An Act to provide for the taxation of lessees and users of tax-exempt property.)

The People of the State of Michigan enact:

Sec. 1. When any real property which for any reason is exempt from taxation is leased, loaned or otherwise made available to and used by a private individual, association or corporation in connection with a business, conducted for profit, except where the use is by way of a concession in or relative to the use of a public airport, park, market, fair ground or similar property which is available to the use of the general public, shall be subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of such property; Provided, however, that the foregoing shall not apply to federal property for which payments are made in lieu of taxes in amounts equivalent to taxes which might otherwise be lawfully assessed or property of any state-supported educational institution.

Sec. 2. Taxes shall be assessed to such lessees or users of real property and collected in the same manner as taxes assessed to owners of real property, except that such taxes shall not become a lien against the property. When due, such taxes shall constitute a debt due from the lessee or user to the township, city, village, county and school district for

which the taxes were assessed and shall be recoverable by direct action of assumpsit."

which statute violates and is repugnant to the provisions of the Constitution of the United States of America and the Constitution of the State of Michigan and is therefore invalid, void and illegal in that said statute proposes a tax upon real property owned by the United States of America, which property is exempt and immune from taxation by the City of Detroit by virtue of said Constitutional provisions.

(1) The statute in question specifically calls an ad valorem tax on the exempt real property itself, and not upon the legal or equitable interest in said property of the lessee or user thereof, and imposes said tax as though the lessee or user were the owner of such property—although said lessee or user is the person on whom said tax is assessed.

(2) Said statute attempts to tax indirectly what cannot be done directly by the City of Detroit, i. e., the property of the United States of America.

(3) Plaintiffs show that there is in existence no waiver of the immunity of said real property and buildings so taxed by the City of Detroit from taxation, nor consent to such taxation of Federally-owned property given by the Congress of the United States of America.

(c) Such statute results in the placing of a direct burden upon the United States of America for the full amount of such tax, in that under the aforedescribed written lease, as amended, between the United States of America and Borg-Warner Corporation, the United States of America assumes ultimate financial responsibility for any taxes levied by any political subdivision or any municipal corporation against said real property, and by so placing the direct and ultimate financial burden of said tax upon the United States Government, such statute is violative of the provisions of the Constitution of the United States.

(d) The statute (Act 189 of Public Acts of 1953) on which the aforedescribed tax by the City of Detroit is based and authorized is violative of the provisions of the Constitution of the United States and of the Constitution of the State of Michigan, in that the assessment thereof constitutes a deprivation of the property of Borg-Warner Corporation (Detroit Gear Divisions), an Illinois corporation, without due process of law and is discriminatory as to Borg-Warner Corporation (Detroit Gear Division), an Illinois corporation, for the following reasons:

(1) Said statute is vague, uncertain and incomplete in that Section 1 thereof fails to state who or what is subject to taxation, and Section 2 thereof fails to state what taxes shall be assessed and further fails to adequately describe which lessees or users of real property are to be assessed and taxed thereunder.

(2) Said statute discriminates against plaintiff, Borg-Warner Corporation (Detroit Gear Division), an Illinois corporation, as against other lessees of tax exempt real property, in that said statute in no way gives consideration to the nature or extent of the leasehold interest of the person so assessed and the provisions of its lease with the owner of such real property.

(3) Said statute authorizes a tax against plaintiff, Borg-Warner Corporation (Detroit Gear Division), an Illinois corporation, on property which is, in fact, solely owned by another person.

(e) Said statute is violative of Article X, Section 6, of the Constitution of the State of Michigan in that it specifically refers to the provisions of the general property tax law of that State to fix the tax and the object thereof.

(f) Said statute violates the provisions of Article X, Section 4, of the Constitution of the State of Michigan in that it does not provide a uniform rule of taxation upon the class of property which it operates.

(g) Said statute violates the provisions of Article X, Section 7, of the Constitution of the State of Michigan in that it fails to assess the interest of Borg-Warner Corporation in the real estate subject to said tax at its true cash value, but rather attempts to tax it as if it were the owner of real property which, in fact, it does not own (but as to which its sole interest is that of a lessee for a fixed term of years).

(h) Said statute is violative of the Constitution of the United States, and particularly the Fourteenth Amendment thereto, in that it denies to plaintiff the equal protection of the law by taxing to plaintiff, Borg-Warner Corporation (Detroit Gear Division), an Illinois corporation, real property which, in fact, is owned by another.

8. Plaintiffs further show that the aforedescribed tax assessed and levied against plaintiff, Borg-Warner Corporation (Detroit Gear Division), an Illinois corporation, in relation to property leased by it at 11111 French Road, Detroit, Michigan, is invalid in that said assessment and levy were made by the City of Detroit on its personal property tax rolls and as if said property so assessed and taxed were personal property, plaintiffs making specific reference to the tax bill of the City of Detroit in question, being Exhibit 2 hereof. Plaintiffs show that such assessment and tax is therefore not in conformity with Act 189, Public Acts of 1953, which is a statute authorizing a tax against real property only, and that even if such statute were held constitutional and valid (all of which plaintiffs most vigorously deny), the specific assessment and tax here in question were not made in conformity with such statute and are therefore wholly void.

9. Plaintiffs show that they bring this action in assumpsit against the City of Detroit under the provisions of Compiled Laws of 1948, Section 211.53, Michigan Statutes Annotated 7.97, being Section 53 of the General Property Tax Act of the State of Michigan, and further show that they have done all things required under said statute to recover a tax illegally assessed and levied against it.

Wherefore plaintiffs pray that they may have judgment against defendant herein in the amount of
11 $6,161.75, together with interest thereon from August 16, 1954, and costs and attorney fees most wrongfully sustained.

Dated at Detroit, Michigan, this 14th day of September, A. D. 1954.

(Sgd.) Glenn M. Coulter,
Attorney for Borg-Warner Corporation (Detroit Gear Division), an Illinois Corporation, Plaintiff,
1703 Ford Building,
Detroit 26, Michigan.

(Sgd.) Fred W. Kaess,
United States Attorney,

(Sgd.) John L. Owen,
Asst. U. S. Attorney,
Attorneys for United States of America,
869 Federal Building,
Detroit 31, Michigan.

12 **Exhibit 1 to Declaration**

Voucher Number 8-87 No. 103347

DETROIT GEAR DIVISION
Borg-Warner Corporation
12345 Kercheval Ave.
Detroit 14, Mich.

August 13, 1954

Pay to the order of Chas. N. Williams,
City Treasurer ..... $6,161.75.

Detroit Gear Division
Borg-Warner Corporation

To A16322 Royden Walters
National Bank of Detroit S. J. Auer
9-32 Detroit, Mich.

Stamped on back:

Pay to the order of Bank of the Commonwealth, Detroit, Michigan, for deposit only, City of Detroit, Chas. N. Williams, City Treasurer.

Paid under Protest Detroit 8-16-54

Paid thru Detroit Clearing House Aug. 17, 1954 or pay to the order of any bank or banker, all prior endorsements guaranteed. Bank of the Commonwealth, Detroit, Mich.

13 **Exhibit 2 to Declaration**

Paving Sewer, Sidewalk or Other Special Taxes not included in this bill

Fiscal Year 1954 City Taxes
July 1, 1954 to June 30, 1955

CITY OF DETROIT

General City Tax Bill

This tax may be paid in two parts if one-half is paid on or before August 15, 1954, and balance is paid on or before January 15, 1955.

WARD ITEM No.

Borg-Warner, Det Gear
12345 Kercheval
Detroit 15, Mich.

Leased
Act Land
189 Bldg
PA 1953

PERSONAL

Paid Under Protest

Property Assessed at

11111 French Rd

PAID
Aug. 16, 1954
CITY OF DETROIT
Chas. N. Williams
City Treasurer

John W. Witherspoon
City Controller
1954

Make checks payable to
Chas. N. Williams, City Treasurer

PAY
THIS or THIS

Valuation Dollars	School Tax Dollars Cts.	City Tax Dollars Cts.	Total Tax Dollars Cts.	Half Tax Dollars Cts.
352060.	4509.88	7813.62	XXXXXX	6161.75

Interest to
Total

A10322

See Information on reverse side

Exhibit 3 to Declaration

PROTEST

We have received a statement for City of Detroit 1954 personal property taxes on leased land and building at 11111 French Road, Detroit, Michigan, said taxes being levied under Act 189, Public Acts 1953 of Michigan. The tax called for is in the total of $12,323.23, based upon an alleged assessment of $352,060.00. It is our understanding that unless these taxes are paid, it is mandatory on the Treasurer of the City of Detroit to enforce the collection thereof by judicial proceedings.

We wish to notify you that we are paying to the City of Detroit, at this time, the sum of $6,161.75, being the first one-half of the taxes levied against us for the year 1954 under the aforedescribed tax statement, but this payment is made under protest and under duress and under threat of the imposition of penalties. We intend to bring suit to recover the amount paid herewith or a portion thereof, together with interest, in accordance with the laws and statutes in such case made and provided. The grounds of our protest are as follows:

1. The assessment and the statute (Act 189, P. A. 1953) on which this tax is based are violative of the Constitution of the United States and of the State of Michigan, in that the assessment and the proposed tax are imposed upon real property owned by the United States Government, which property is exempt from taxation by the City of Detroit.

2. Act 189, P. A. 1953, is violative of the Constitution of this State and the United States in that it is a discriminatory tax and deprives us of our property
15 without due process of law, and of the equal protection of the law.

3. Michigan Public Act 189, 1953, is violative of the Constitution of this State in that it fails to meet the constitutional requirements of uniformity and equality of ad valorem taxation of real property, and that assessments shall be fixed at true cash value.

4. The Action of your department in placing said assessment on the personal property assessment rolls is im-

proper, in that said invalid statute purports to authorize assessment, and a tax thereon, upon real property. Further, if such assessment were judicially determined to be a proper assessment on personal property, it would subject us to double taxation in violation of the Constitution of this State.

Detroit Gear Division of Borg-Warner Corporation, an Illinois Corporation,

By: s/ Royden Walters,
Secretary-Treasurer
12345 Kercheval,
Detroit 14, Michigan

Dated: August 16, 1954.

Received the foregoing protest and the check referred to therein.

s/ Chas. N. Williams—RMM
(Treasurer of the City of Detroit)

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16 IN CIRCUIT COURT OF WAYNE COUNTY

Answer and Special and Affirmative Defenses—Filed October 19, 1954

Now comes the City of Detroit, a municipal corporation, made defendant in the above entitled cause, and for answer to the declaration heretofore filed, respectfully shows to the Court:

1. That it admits the matters set forth in paragraph one of said declaration.

2. That it denies that the notice mentioned in paragraph two covered all the real property at 11111 French Road, Detroit, Michigan; and further denies that the general City tax bill mentioned in said paragraph was based on the assessment as aforedescribed therein but says it was based on that portion thereof which was used and occupied by and leased to plaintiff Borg-Warner Corporation by the United States of America in connection with said Corporation's business conducted for profit.

3. That it admits the allegations in paragraph three contained with the exception of the validity of the grounds of the written protest therein referred to and denies the legal sufficiency thereof.

For further answer defendant says that the assessment in question is a valid, legal, uniform and lawful assessment and was not made against the United States of America, its operations or instruments or any of its property being used for governmental functions or public purposes.

17 For further answer defendant shows that plaintiffs have failed to exhaust their administrative remedies, will show that plaintiffs have not complied with the provisions of Title VI, Chapter II, Sections 4, 5 and 6 and other pertinent provisions of the Detroit Charter and will show that plaintiffs have not conformed to the requirements of Ordinance 375-E of the Compiled Ordinances of 1945, a copy of which Ordinance is hereto attached and marked Exhibit 1; and that plaintiffs have failed to comply with the provisions of Sections 211.29 and 211.30 of the Compiled Laws of Michigan, 1948.

4. That it neither admits nor denies the matters in paragraph four although it believes same to be true and therefore leaves plaintiffs to their proofs as to the ownership of the real property and buildings at 11111 French Road, Detroit, Michigan. However, defendant denies that same were assessed qualitatively as alleged therein but only quantitatively inasmuch as the assessment made by the defendant was based on that portion thereof which was used and occupied by and leased to the plaintiff Borg-Warner Corporation by the United States of America in connection with said Corporation's business conducted for profit.

For further answer defendant says that the assessment in question is a valid, legal, uniform and lawful assessment and was not made against the United States of America, its operations or instruments or any of its property being used for governmental functions or public purposes.

5. That it admits the matters set forth in paragraph five except as to the date of amendment of the lease and except as to the last sentence of said paragraph which defendant neither admits nor denies and leaves plaintiff Borg-Warner Corporation to its proofs.

18 6. That it neither admits nor denies the matters set forth in paragraph six for lack of information sufficient to form a belief and therefore leaves plaintiffs to their proofs.

7. Defendant denies each and every allegation, presumption, premise and conclusion, both legal and factual, in paragraph seven contained and in support of same will rely on the provisions of the General Property Tax Law of the State, as amended by Act 189 of 1953, and the Charter of the City of Detroit.

(a) Defendant denies each and every allegation, presumption, premise and conclusion, both legal and factual, in subparagraph (a) and particularly denies that the assessment in question is repugnant to the Constitution of the United States and the Constitution of the State of Michigan for the reasons heretofore given.

(b) Defendant admits that the tax in question was levied and authorized by Act 189 of the Public Acts of Michigan, 1953, but denies the remaining allegations of sub-paragraph (b) for the same reasons heretofore given.

(1) Defendant makes no reply to the matters set forth in sub-paragraph one, same being conclusions of law for the Court to consider and determine.

(2) Defendant denies the matters set forth in sub-paragraph (b) (2), and says no tax was laid upon the United States of America or any of its property being used for governmental functions or public purposes.

19 (3) Defendant makes no answer to the matters set forth in sub-paragraph (b) 3, same being based on an incorrect, unfounded assumption which results in an erroneous inapplicable conclusion of law.

Further answering, defendant shows that the assessment in question is a valid, legal, uniform and lawful assessment and was not made against the United States of America, its operations or instruments or any of its property being used for governmental functions or public purposes.

(c) That it denies each and every allegation, presumption, premise and conclusion in sub-paragraph (c) and particularly denies that the Statute in question is violative of the provisions of the Constitution of the United States.

Further answering defendant shows that the amendment to the lease referred to therein was executed for Borg-Warner Corporation on February 23, 1954 and for the United States of America on March 3, 1954 although purporting to be effective December 1, 1952.

Further answering defendant shows that Act 189 in question here was adopted June 10, 1953 and the first tax levied thereunder was based on an assessment on January 1, 1954, the tax date provided by law in this State which was prior to the date of execution of said amendment to plaintiff's lease.

(d) That it denies each and every allegation, presumption, premise and conclusion, both legal and factual, in sub-paragraph (d) and each and every of the sub-paragraphs (1), (2) and (3) thereunder.

(e) That it denies each and every allegation, presumption, premise and conclusion, both legal and factual, in sub-paragraph (e), (f), (g) and (h).

7. That it denies that the subject tax is invalid or not in conformity with the Act 189, Public Acts of Michigan, 1953, as alleged in the second paragraph numbered seven (7), and denies that same is void for the reasons stated therein or for any reason whatsoever.

8. That it denies that the plaintiffs have done all things required under the Statutes of the State of Michigan prior to bringing suit to recover taxes and shows that plaintiffs have failed to exhaust their administrative remedies, have not complied with the provisions of Title VI, Chapter II, Sections 4, 5 and 6 and other pertinent provisions of the Detroit Charter, have not conformed to the requirements of Ordinance 375-E of the Compiled Ordinances of 1945, a copy of which ordinance is hereto attached and marked Exhibit 1, and have failed to comply with the provisions of Sections 211.29 and 211.30 of the Complied Laws of Michigan, 1948.

That it denies each and every other allegation in the declaration not otherwise admitted, controverted or specifically denied.

That it denies that plaintiffs are entitled to the sum claimed or any sum whatsoever and therefore asks that the declaration be dismissed and plaintiffs' action held for naught.

SPECIAL AND AFFIRMATIVE DEFENSES

And now comes the defendant and by way of special and affirmative defenses says as follows:

1. The matters alleged do not constitute a cause of action at law.

2. Neither the Constitution of the United States nor the Constitution and Statutes of the State of Michigan confer constitutional immunity from non-discriminatory State taxation for the private benefit of plaintiff, Borg-Warner Corporation.

3. No tax has been laid on the United States Government, its property interest, or its operations in the case at hand by virtue of the General Property Tax Act of Michigan as amended by Act 189, Public Acts, 1953.

4. No interference with or lien against the title of the United States Government in the subject property is indicated or applied by Act 189, Public Acts, 1953, or by defendant's construction thereof.

5. Neither the United States of America, or any of its instrumentalities or the operations thereof are subjected to interference or the incidence of the tax herein.

6. The tax in question was levied only against the party in possession based on its lease which gave it the use of the subject real estate in connection with its business conducted for profit.

7. Plaintiff Borg-Warner Corporation is estopped from claiming the benefit of governmental immunity from non-discriminatory taxation.

8. Plaintiff Borg-Warner Corporation is estopped from seeking a favorable position in regard to State non-discriminatory taxes, the result of which would cause all re-

maining taxpayers in the same category to be discriminated against and violate the constitutional principle of uniformity.

9. Plaintiff Borg-Warner Corporation is estopped to deny that it is subject to all general local laws pertaining to the matters set forth in its declaration.

22 10. That plaintiffs have not exhausted their administrative remedies, in support of which defendant will show:

(a) That plaintiffs have not complied with provisions of Title VI, Chapter II, Sections 4, 5 and 6 and other pertinent provisions of the Detroit City Charter;

(b) That plaintiffs have not conformed to requirements of Ordinance 375-E of the Compiled Ordinances of 1945, a copy of which ordinance is attached to this Answer, marked Exhibit 1;

(c) That plaintiffs have failed to comply with provisions of Sections 211.29 and 211.30 of the Compiled Laws of 1948 of Michigan.

Based on all of which defendant will move to dismiss the within cause at the hearing thereof when same is assigned for trial.

Further defendant denies that plaintiffs are entitled to judgment in the amount claimed or any amount whatsoever and asks that the said cause be dismissed with costs.

City of Detroit, a Michigan municipal corporation, Defendant,

By Paul T. Dwyer,
Corporation Counsel,
Bert R. Sogge and
Julius C. Pliskow,
Assistants Corporation Counsel

By Bert R. Sogge and
Julius C. Pliskow,
Attorneys for said Defendant,
301 City Hall,
Detroit 26, Michigan.

Dated: October 18, 1954.

Exhibit 1 to Answer

ORDINANCE NO. 375-B

(Make notation on page 149)

TAX DAY—BOARD OF REVIEW

AN ORDINANCE to establish a tax day for the City of Detroit and to provide for an annual review of the assessment of real and personal property for general city taxes.

IT IS HEREBY ORDAINED BY THE PEOPLE OF THE CITY OF DETROIT:

Section 1. In the year 1950 and each year thereafter, the first day of January shall be deemed the tax day in the City of Detroit. The taxable status of persons and real and personal property shall be determined as of said date. Notice that the assessment rolls are prepared as of the first day of January and will be completed and available for inspection beginning February first, shall be given as provided by the Charter of the City of Detroit. All general city taxes levied upon real and personal property shall become a debt against the owner on January 1, 1950, and on January first each year thereafter.

Sec. 2. Any person considering himself aggrieved by reason of any assessment may make complaint on or before February 15th, either orally or in writing, before the Board of Assessors, and on sufficient cause being shown by the affidavit of such persons, or by oral proof, or by other evidence, to the satisfaction of such Board, it shall review the assessment complained of and
24 may alter or correct the same as to the person charged thereby, the property described therein, and the estimated value thereof. The concurrence of a majority of the Board shall be sufficient to decide the question of altering or correcting any assessment complained of. The Board shall forthwith notify all persons complaining of the action of the Board with reference to the assessment or assessments complained of. The period for the review by the Board of Assessors shall be February 1st to February 15th, inclusive, each year. The period for revision and correction of the rolls by the Board of Assessors shall begin February 16th and shall conclude on the

first Monday in March each year. The Board of Assessors having completed the review, revision and correction of said assessment rolls, shall sign, and on the first Tuesday next following the first Monday in March each year, return the same to the Common Council. The completion and signing of the auxiliary book of the Board of Assessors' office shall be deemed a completion of the rolls and the receipt by the Council of a communication from the Board of Assessors announcing the completion of the rolls shall be deemed a delivery of said rolls to the Council. Any person, firm or corporation owning taxable personal property may file their sworn statement as required by law at any time prior to February 15th each year; such statement shall list the personal property owned by such person, firm or corporation upon January first immediately preceding, except that inventories of goods, wares, materials, merchandise and supplies such as are commonly used in trade or commerce or manufacture may be shown in the total of such inventories for each of the twelve months preceding such first day of January or each of the months of the last preceding fiscal year of such owner.

Sec. 3. The Common Council, after receiving said assessment rolls, shall at ten o'clock A. M. on the Tuesday next following the first Monday in March, 1950, and the same each year thereafter, proceed to consider the same, and any person who has previously complained to the Board of Assessors as herein provided in Section 2, considering himself aggrieved by the assessment of his property, and the decision of the Board of Assessors thereon, may appeal to the Council; such appeal shall be in writing and shall state, specifically, the grounds thereof and the matter complained of; together with the address of the complainant, and no other matter in connection therewith shall be considered by the Council. Such appeal shall be filed on or before the Tuesday following the first Monday in March and may not be filed thereafter. The Council may refer such assessment rolls and appeals to a Committee of the Council for consideration. The Committee shall give notice to any person who has filed an appeal, as above provided, of the time and place of the meeting for the hearing thereof, which notice may be made in writing by delivering the same to such person or leaving the same at his place of residence or place of business

with some other person of proper age and discretion, or by mail to the address of such complainant. While acting upon said assessment rolls or appeals, any member or employee of said Board of Assessors may, and on request of the Council or such Committee by resolution, shall meet with said Council or Committee, and make such explanations as he may deem requisite in any case.

Sec. 4. The Council or Committee shall hear and determine all appeals in a summary manner and correct any errors which they may discover in the assessment rolls; ~~shall place thereon the names of any persons and~~ the descriptions of any property not already assessed and assess the same; and may increase or diminish any assessment as they see fit; Provided, That the Council or such Committee shall not increase any assessment without giving a reasonable opportunity to persons owning or having charge of the same, if known, to appear and object thereto. The consideration of the assessment rolls and hearing of appeals may be continued from session to session of a period not less than five (5) days or exceeding sixteen (16) days after the date of their delivery to the Council. The Committee shall make a report to the Common Council in the premises and the Council may adopt, change or amend the same, in whole or in part. After due consideration thereof, said rolls shall on or before the first Monday in April be fully and finally confirmed by the Council, and shall remain as the basis, according to property valuation, of all taxes to be levied and collected in the City until another assessment shall have been made and confirmed as herein provided. In the event that any date set forth in this ordinance falls on a Sunday or legal holiday, such time shall be extended to the next succeeding business day.

Sec. 5. All ordinances or parts of ordinances in conflict herewith are hereby repealed.

(JCC 2948, Sept. 27, 1949).
Passed Oct. 4, 1949.
Approved Oct. 11, 1949.
Published Oct. 12, 13, 14, 1949.
Effective Nov. 10, 1949.

Thomas D. Leadbetter,
City Clerk.

27 IN CIRCUIT COURT OF WAYNE COUNTY

Reply of Plaintiffs to Answer and Special and Affirmative Defenses of Defendant—Filed January 12, 1955

Now comes United States of America, by its attorneys, Fred W. Kaess, United States Attorney, and John L. Owen, Assistant United States Attorney, on behalf of and at the direction of the Attorney General of the United States of America, and Borg-Warner Corporation (Detroit Gear Division), an Illinois corporation, by its attorney, Glenn M. Coulter, which parties are co-plaintiffs herein, and make reply to the answer and special and affirmative defenses filed herein by defendant, and say:

REPLY TO ANSWER OF DEFENDANT

1. Co-plaintiffs deny each and all of the allegations and affirmative matter contained in the answer of defendant and specifically all such allegations and affirmative matter contained in paragraphs (1) through (8), inclusive, of said answer, plaintiffs showing that all such affirmative matter is reiterated by the said pleading of defendant under the entitlement "Special and Affirmative Defenses", and to which specific denials are hereinafter made.

2. Plaintiffs admit, however, that the assessment mentioned in paragraph (2) of its declaration and in paragraph (2) of defendant's answer was based only on that portion of real property at 11111 French Road, Detroit, Michigan, which was used and occupied and leased to plaintiff Borg-Warner Corporation by the United States of America.

28 ANSWER OF PLAINTIFF TO SPECIAL AND AFFIRMATIVE DEFENSES

And now come co-plaintiffs herein and make answer to the specific special and affirmative defenses set forth by defendant on pages (5) through (7) of the said answer of defendant, and say as follows:

1. Plaintiffs deny the matters set forth in paragraph 1 thereof.

2. Plaintiffs admit the conclusion of law set forth in paragraph 2 thereof is a correct statement, but say that the state tax in question in this litigation is discriminatory and that said state tax violates the constitutional immunity of the United States of America against taxation by the State of Michigan on any of its governmental subdivisions, and that said statement of law is therefore immaterial and irrelevant to the issues raised by the declaration of plaintiff.

3. That plaintiffs deny the allegations contained in paragraph 3 thereof.

4. That plaintiffs deny the allegations contained in paragraph 4 thereof.

5. That plaintiffs deny the allegations contained in paragraph 5 thereof.

6. That plaintiffs deny the allegations contained in paragraph 6 thereof.

7. That plaintiffs deny the allegations contained in paragraph 7 thereof.

8. That plaintiffs deny the allegations contained in paragraph 8 thereof.

9. That plaintiffs deny the allegations contained in paragraph 9 thereof.

29 10. Plaintiffs deny the allegations contained in paragraph 10 thereof, including sub-paragraphs a, b, and c of said paragraph 10, stating that they have complied with all requirements of the law of the State of Michigan in relation to the required procedure for the institution of a suit for a refund of taxes; which taxes are based upon an unconstitutional, illegal and wholly void taxing statute and assessment, and that under such circumstances, plaintiffs are not compelled to seek any administrative remedy of whatsoever nature as a condition precedent to the filing of their declaration herein.

Wherefore, plaintiffs pray that they may have judgment against the defendant as prayed in their declaration on file herein.

Dated at Detroit, Michigan, this 12th day of January, A. D., 1953.

(Sgd.) Glenn M. Coulter,
Attorney for Borg-Warner Corporation (Detroit Gear Division), an Illinois Corporation—Plaintiff,

Fred W. Kaess,
United States Attorney,

By: (Sgd.) John L. Owen,
Assistant United States Attorney,

Attorneys for United States of America.

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30 IN CIRCUIT COURT OF WAYNE COUNTY

Pre-Trial Statement—Filed April 14, 1955

Proceedings had before the Honorable Ira W. Jayne, Circuit Judge, in the above entitled cause, on Wednesday, April 13, 1955.

Appearances: Thomas E. Coulter, Esq., appearing on behalf of co-plaintiffs; Julius C. Pliskow, Esq., appearing on behalf of defendant.

This lawsuit involves certain taxes levied by the City of Detroit.

Counsel have cooperated in waiving a jury trial and have prepared an agreed stipulation of facts which is attached hereto and made a part of the pre-trial statement.

While there is a saving clause for additional evidence, they contemplate that no additional evidence will be necessary excepting the formal marking of certain ordinances, resolutions, and so forth.

They request that the case be assigned to a Judge for preliminary discussion before presentation of formal briefs, and it is so ordered.

(Sgd.) Ira W. Jayne,
Circuit Judge.

(The parties hereto executed a written stipulation of facts in the Trial Court, which as noted above, was filed on April 14, 1955 and made a part of the above pre-trial statement. The said stipulation of facts together with the testimony taken at the trial of said cause constituted the facts upon which the opinion and judgment of
31 the Trial Court was made. Inasmuch as all of the facts stipulated to in said written stipulation are contained in the agreed statement of facts constituting the settled record, the contents of such stipulation are not made a part of this record.)

IN CIRCUIT COURT OF WAYNE COUNTY

Motion for New Trial—Filed September 12, 1955

Now come the above named co-plaintiffs, United States of America, by its attorneys, Fred. W. Kaess, United States Attorney, and John L. Owen, Assistant United States Attorney, on behalf of and at the direction of the Attorney General of the United States of America, and Borg-Warner Corporation, (Detroit Gear Division), an Illinois corporation, by its attorney, Glenn M. Coulter, and move this Court for an order setting aside the judgment of no cause of action entered in said cause on the 25th day of August, A. D., 1955, and granting a new trial therein, for the following reasons:

1. Because such judgment is based upon a written opinion of this Court dated August 23, 1955, which opinion and the findings of the Court therein contained are contrary to the law and to the decisions of the Supreme Court of the United States of America, and because the decisions relied upon by the Court in said opinion do not support the conclusions therein expressed.

2. Because said judgment and written opinion of the Court uphold the validity of an illegal and unconstitutional taxing statute which attempts to subject the United States of America and its properties, and lessees of its properties, to unlawful and discriminatory taxation.

32 3. Because said judgment and written opinion of the Court uphold the validity of an illegal and un-

constitutional tax assessed against real property owned by the United States, which property is exempt and constitutionally immune from taxation by the City of Detroit.

4. Because the judgment of no cause of action rendered in favor of defendant results in a miscarriage of justice as against plaintiffs herein, for the reasons above stated.

This motion is based upon the files and records in this cause, the affidavit of John L. Owen attached hereto, and upon the brief of arguments and law relied upon by plaintiffs in support of their contention as to the merits of the within cause, which brief is filed with the Court simultaneously herewith.

The Court is hereby respectfully requested to file reasons in writing in case said new trial is denied.

Dated at Detroit, Michigan this 12th day of September, A. D., 1955.

/s/ Glenn M. Coulter,
Attorney for Borg-Warner Corporation (Detroit Gear Division), an Illinois Corporation, Plaintiff,

/s/ Fred W. Kaess,
United States Attorney,

/s/ John L. Owen,
Assistant United States Attorney,
Attorneys for United States of America.

33 **Affidavit in Support of Motion for New Trial**

State of Michigan,
County of Wayne—ss.

John L. Owen, being first duly sworn, deposes and says he is an Assistant United States Attorney, and that by and under the direction of the Attorney General of the United States of America, he is one of the attorneys representing the United States of America in the within cause.

Deponent further says that the attached motion for new trial should be granted for the reason that the within cause presents questions of extreme public importance

both to the State of Michigan, and its local sub-divisions having taxing authority, as well as to the United States of America, and because the judgment of this Court of no cause of action in favor of defendant herein dated August 25, 1955, sustains the validity of a statute of the State of Michigan, which he verily believes is clearly unconstitutional, invalid and unlawful and which discriminates against the United States of America and lessees of its properties.

Deponent further says that plaintiffs have filed simultaneously herewith their complete brief of the law in support of their arguments on which they rely in attacking the constitutionality and validity of said statute of the State of Michigan here in question and of the assessment based upon said statute here under dispute, and that the extreme importance of the within cause to the public
34 requires that this Court reconsider said issues upon a study of said brief.

Further deponent sayeth not.

/s/ John L. Owen.

On this 12th day of September, A. D., 1955, before me personally appeared John L. Owen, to me known, who under oath said that he has read the foregoing affidavit by him subscribed, that he knows the contents thereof and that the same is true of his own knowledge except as to matters therein stated to be upon information and belief, and as to those matters, he believes them to be true.

/s/ Dwight K. Hamborsky,
Notary Public, Wayne County, Michigan.
My commission expires: March 31, 1956.

IN CIRCUIT COURT OF WAYNE COUNTY

Response to Motion for New Trial—Filed September 16, 1955

Comes now the City of Detroit, a municipal corporation, made defendant in the above entitled cause, and by way of response to the motion heretofore filed by and on behalf of the plaintiffs therein, says:

1. It is denied that the judgment entered in said action based upon the written opinion of this Court or said opinion or findings are contrary to law or to the decisions of the Supreme Court of the United States; likewise it is denied that the decisions relied upon by the Court in said opinion do not support the conclusions therein expressed.

35 2. It is denied that the judgment and written opinion of this Court in effect subject the United States of America or its properties, or lessees thereof, to unlawful and discriminatory taxation.

3. It is denied that said judgment and written opinion of the Court in effect uphold a tax against real property owned by the United States.

4. It is denied that the judgment entered herein results in a miscarriage of justice against plaintiffs.

5. It is respectfully submitted that the motion for new trial should be denied by this Court for the reasons stated in its opinion dated August 23, 1955 upholding the validity of Act 189 of the Public Acts of Michigan, 1953.

/s/ Paul T. Dwyer,
Corporation Counsel,

Bert R. Sogge,
Julius C. Pliskow,
Assistants Corporation Counsel,

By /s/ Julius C. Pliskow;
Assistant Corporation Counsel,

Attorneys for Defendant,
1010 City-County Building,
400 Woodward Avenue,
Detroit 26, Michigan.

Dated: September 16, 1955.

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36 IN CIRCUIT COURT OF WAYNE COUNTY

Settled Record (Consisting of Stipulated Statement of Facts)

1. Plaintiff, Borg-Warner Corporation, an Illinois corporation, is a lessee of a portion of real property located

at 11111 French Road, Detroit, Michigan, under a five year lease with the United States of America, as Lessor, and Borg-Warner Corporation, as Lessee, dated August 14, 1950, but effective as of March 8, 1948, which lease was amended by a written amendment executed on March 3, 1954, but dated as of December 1, 1952.

At the trial of this cause before Hon. Herman Dehnke on April 28, 1955, testimony was confined to identification and introduction of exhibits, at which time a copy of said lease and the written amendment thereto were received in evidence under stipulation of the parties that the same constituted true copies of such original documents. Said exhibits were respectively marked "Exhibits 'A' and 'B'" of co-plaintiffs herein, and by further stipulation of the parties hereto, such photostatic copies are transmitted directly to the Supreme Court as permitted by Rule 63.

The following is a condensation and analysis of said lease and written amendment thereto:

Lease: NOy (R)—60040:—

Parties: United States of America, Borg-Warner Corporation, Organized under law of Illinois, 310 S. Michigan Avenue, Chicago 4.

Subject Property: Naval Industrial Reserve Plant, 11111 French Road, Detroit, facilities but not excepted area.

Reason for Leasing: Not, for the time being, required for public use—Standby facility against a national emergency.

Authority: Act of Congress, Aug. 5, 1947 (61 Stat. 774, 34 U. S. C., Sec. 522a) Approved as required by Act of Congress, April 4, 1944. (58 Stat. 189, 190).

Term: Five years from March 8, 1948 to and ending on March 7, 1953 with option to extend for 3 additional terms of 5 years each. Executed Aug. 7, 1950. (Letter of intent dated March 8, 1948 is terminated).

Rent: To pay $20,400.00 for first year. $2,400.00 for each lease year thereafter plus 5½¢ per sq. ft. for space added to manufacturing area by removal of government owned materials.

Maintenance: Obligation of Borg-Warner to certain maximum amounts to be expended each year.

Insurance Risk: Obligation of Borg-Warner including property damage and third party bodily injury and property damage.

Termination Privileges by Government:

(a) Upon declaration of national emergency, by President or Congress.

(b) Upon 120 days' notice by Secretary of Navy in interests of national defense.

(c) Upon offer to sell as surplus and tenant's notice it does not desire to exercise option.

(d) Following 120 days' notice in event Borg-Warner defaults in terms of lease, except where beyond its control.

38 Taxation: In event Congress acts to permit state and local taxes imposed on other than Borg-Warner's possessory interest then lease to be renegotiated.

Liens: Borg-Warner not to do or suffer anything to be done which would subject facilities to any liens.

FIRST AMENDMENT TO LEASE NOy (R)—60040

Parties: Same.

Subject Property: Same.

Reason for Amendment: Election to extend for 5 years to March 7, 1958.

Authority: Same as above.

Term: Five years to March 7, 1958 with two additional terms of 5 years each. Executed February 23, 1954 and March 3, 1954, respectively, by parties as of December 1, 1952.

Added Terms: Tenant to heat space retained by government at its own cost and expense.

Rent: Tenant to pay an additional cash rent of $44,966.64 representing unexpended portion of maximum amount

to be expended for maintenance, $24,000 per annum in advance for year March 8, 1953—March 7, 1954 and thereafter semi-annually plus additional rent at 70¢ per sq. ft. per annum for space added to manufacturing area.

Rent Proviso Taxes: Effective March 8, 1954 through term of lease, tenant to deduct and pay from stipulated semi-annual installments any taxes assessed against it under provisions of Act 189, P. A. 1953 or other taxation statutes which attempt to tax Borg-Warner on the basis of assessed value of facilities leased to it or on the basis of the value of its lease-
39 hold interest or for any other reason because of its use and occupancy under this lease.

Borg-Warner to repay any taxes refunded and to cooperate with Government including payment of such taxes under protest, if so required by Government.

Maximum Maintenance: Amended to $35,000.00.

Otherwise, all other terms and conditions of original lease contract to remain in full force and effect.

2. The portion of said premises leased by Borg-Warner Corporation consists of a portion of an industrial plant, building and grounds, located on said premises. Such portion of said premises are used exclusively by Borg-Warner Corporation for manufacturing purposes in its business conducted for profit.

3. The United States of America is the present owner in fee simple of said real property at 11111 French Road, Detroit, Michigan, and has been the sole owner thereof prior to and since January 1, 1954. Borg-Warner Corporation's sole interest in said real property is that of a lessee as aforedescribed.

4. Borg-Warner Corporation was, as of January 1, 1954, assessed by the Board of Assessors of the City of Detroit for a tax levied under the provisions of Act 189 of Public Acts of 1953 of the State of Michigan, (C. L. 1948 Supp., 211.181 and 211.182), which Act reads as follows:

40 **Taxation of Lessees and Users of Tax-Exempt Real Property**

Act 189, 1953, p. 252; imd. eff. June 10 (##7.7 (5), 7.7 (6)).

AN ACT to provide for the taxation of lessees and users of tax exempt property.

The People of the State of Michigan Enact:

Section 1. When any real property which for any reason is exempt from taxation is leased, loaned or otherwise made available to and used by a private, individual, association or corporation in connection with a business conducted for profit, except where the use is by way of a concession in or relative to the use of a public airport, park, market, fairground or similar property which is available to the use of the general public, shall be subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of such property: Provided, however, That the foregoing shall not apply to federal property for which payments are made in lieu of taxes in amounts equivalent to taxes which might otherwise be lawfully assessed or property of any state-supported educational institution.

Section 2. Taxes shall be assessed to such lessees or users of real property and collected in the same manner as taxes assessed to owenrs of real property, except that such taxes shall not become a lien against the property. When due, such taxes shall constitute a debt due from the lessee or user to the township, city, village, county and school district for which the taxes were assessed and shall be recoverible by direct action of assumpsit.

41 Pursuant to said Act, the Board of Assessors valued as of that date the real property at 11111 French Road, Detroit, Michigan, occupied by Borg-Warner Corporation, precisely as it would have done had such real property been owned in fee simple and occupied by Borg-Warner Corporation. It valued such property at the true cash value of the fee simple ownership of that portion of said plant site under lease, on the basis defined in Michi-

gan Statutes Annotated, Section 7.27, (C. L. 1948, Sec. 211.27) which states:

> The words "cash value," whenever used in this act, shall be held to mean the usual selling price at the place where the property to which the term is applied shall be at the time of assessment, being the price which could be obtained therefor at private sale, and not at forced or auction sale. In determining the value the assessor shall also consider the advantages and disadvantages of location, quality of soil, quantity and value of standing timber, water power and privileges, mines, minerals, quarries or other valuable deposits known to be available therein and their value. (C. L. 1948, # 214.27; C. L. 1929, # 3415; C. L. 1915, # 4021; C. L. 1907, # 3850),

giving consideration to the advantages and disadvantages enumerated in such section.

Said valuation concerned itself solely with that portion of said premises leased by Borg-Warner Corporation.

The valuation of the leased real estate thus determined was in the amount of $352,060.00 and such valuation was accordingly set down upon the personal property tax rolls of the City of Detroit opposite the description of the
42 parcel to which it pertained, and a tax bill was thereafter issued by the Treasurer of the City of Detroit to Borg-Warner Corporation. A photostatic copy of the City of Detroit Property Tax Assessment Roll dealing with the property at 11111 French Road, Detroit, Michigan, was received in evidence as Defendant's Exhibit 2. By stipulation of the said parties, the said Exhibit 2 of defendant is being transmitted directly to the Supreme Court. A witness of defendant testifying in relation to said assessment roll, gave testimony as to the owner and lessee of each of the four parcels shown on said exhibit, testifying that the owners of each were the United States of America or a municipal corporation of the State of Michigan.

The portion of the real property occupied by Borg-Warner Corporation on said premises was not assessed to Borg-Warner Corporation pursuant to Michigan Stat-

of suit, Borg-Warner Corporation had not protested the validity of said assessment of tax through the Common Council of the City of Detroit or any administrative tribunal or agency of the City of Detroit or the State of Michigan.

10. It was stipulated between the parties to this cause that the charter provisions, ordinances and resolutions of the Common Council of the City of Detroit applicable to and covering the within matters are to be considered as a part of the record of this cause, and could be referred to by either party without being introduced formally in evidence. Defendant attached Ordinance 375-E of the City of Detroit to its answer as Exhibit 1. It relied on the provisions thereof as the basis for its special defense pointing to failure of Borg-Warner Corporation to pursue prescribed administrative remedies prior to instituting suit.

11. On August 25, 1955, subsequent to the trial of said cause, and pursuant to a written opinion of the Trial Judge, a judgment was entered for no cause of action in favor of defendant, City of Detroit. On September 16, 1955, the Trial Judge denied a motion for new trial filed by plaintiffs and appellants herein, and on September 21, 1955, an order was entered denying said motion for new trial. No written opinion was filed by the Circuit Judge in relation to said motion for new trial, but a transcript of the proceedings at such hearing is as follows:

Transcript of Proceedings of Hearing on Motion for New Trial

Proceedings had upon the above-entitled cause, taken before the Honorable Herman Dehnke, Circuit Judge, (visiting), at Detroit, Michigan, on Friday, September 16, 1955.

Appearances: Mr. Lyle M. Turner, United States Department of Justice, Washington, D. C.; Mr. John L. Owen, Assistant United States Attorney, Detroit, Michigan; Mr. Thomas E. Coulter, 1703 Ford Building, Detroit 26, Michigan, representing Borg-Warner Corporation; Mr. Julius C. Pliskow, Assistant Corporation Counsel, City of Detroit, Michigan.

45 Detroit, Michigan,
Friday, September 16, 1955
About 2 o'clock P. M.

Mr. Coulter: This is a motion for a new trial. On behalf of the co-plaintiffs, The United States of America, and Borg-Warner Corporation, Mr. Lyle M. Turner, an attorney with the Department of Justice in Washington, counsel here for the United States of America, is here to argue this motion on behalf of the plaintiffs.

I would like to present Mr. Turner to the Court at this time.

The Court: Well, I am just wondering, gentlemen, whether you have anything to present that is not included in the brief which ou filed in the case, and of which I have had a copy for several days?

Mr. Pliskow: May I submit a response to the motion for a new trial, for the record, Your Honor?

The Court: You are filing an answer?

Mr. Pliskow: Yes, sir.

The Court: All right. I was just wondering whether you had anything more to present than is included in that brief?

Mr. Turner: We have nothing more in substance, Your Honor, to present.

The Court: Well, I think I should say this then. Ordinarily I am more than glad to hear from counsel in argument of a case. I think perhaps the reason for the filing of this motion is that I overlooked stating in my opinion that although the plaintiffs had not furnished me with a brief in this case, I had had the benefit of very complete and exhaustive briefs
46 in two cases in Muskegon County; in one of which at least the issues, as I see it, were substantially identical with those in this case.

I have gone over this brief sufficiently to satisfy myself that there is nothing in the motion, and in the briefs, which was not covered in those briefs; and I do not think any cases are cited in this brief which were not cited in those.

I say that merely to eliminate any supposition that might have existed that I had made a decision with-

out going into these cases. While I do not have my memorandum with me, I am sure I spent at least three full days in studying those cases. You will recall, Mr. Coulter I think, that there was some correspondence between myself and Mr. Street of Muskegon?

Mr. Coulter: Yes, sir. You sent me copies, Your Honor.

The Court: He had learned somehow that this case had been assigned to me, and asked permission to file those briefs. I told him I thought that would be proper as long as he notified counsel on the other side that that was being done.

So, I am frank to say that I make no claim to infallibility, and I could be mistaken of course, but that decision was rendered after careful study of all these cases, including those that are mentioned in plaintiffs' briefs now before the Court.

For that reason I think we might just as well face the situation. There is nothing to be gained by pursuing the motion for a new trial. In the interest of all parties concerned, the sooner the case gets to the Supreme Court, the better.

47 That is the reason why I inquired whether the plaintiffs had anything further to present than their brief covered. They having stated that they do not, I think it is in order to deny the motion for a new trial, and then you can be on your way.

Mr. Pliskow: I had no idea that Your Honor was familiar with the matters in the Muskegon cases.

The Court: They are very good briefs, the same as this one which has just recently been furnished by the Government and the Borg-Warner Corporation, on their behalf. But, as I say, I have gone over that ground thoroughly, and right or wrong, those are my conclusions.

(Which were all of the proceedings had upon the above-entitled cause.)

IN CIRCUIT COURT OF WAYNE COUNTY

Opinion—August 23, 1955

(File Endorsement Omitted)

This is an action to recover a tax of $6,161.75 paid under protest. The case was submitted, principally on an agreed statement of facts, on April 28th last, on principal briefs to be furnished within 30 days; and reply briefs 15 days later. Defendant's brief was furnished to the Court more than two months ago, but none has been received from plaintiffs, although last promised for not later than August 20th. Under the circumstances the Court does not feel justified in delaying decision further, especially since the reasoning of defendant's brief, and the cases cited in support thereof, seem determinative of the issues.

48 The assessment in question was made under authority of Act 189, P. A. 1953, being C. L. 1948 Supp. 211.181-2, against plaintiff Borg-Warner, lessee of the owner, plaintiff United States. Plaintiffs claim the statute to be unconstitutional as an indirect attempt to tax property of the United States. Defendant denies this claim, and also moves that the action be dismissed because plaintiffs have not exhausted their administrative remedies under state and city laws. Defendant has indicated, however, that while it is not waiving this point, it would prefer to have decision rested on the fundamental issue of the validity of the tax.

The assessment in question was measured by the valuation of that portion of improved real property at 11111 French Road in Detroit which was occupied by Borg-Warner and used by it exclusively for manufacturing purposes in its business conducted for profit, its interest being that of a lessee.

The lease was dated August 14, 1950, effective as of March 8, 1948. By amendment dated March 3, 1954, dated as of December 1, 1952, the lease was extended for a further term of five years from March 8, 1953, at an increased rental, and permitting Borg-Warner to take credit for any taxes assessed against it under the Act in question. In this manner, the "economic burden" of the tax is claimed to be placed on the United States. Defend-

ant takes the position that the statute authorizes a non-discriminatory tax which is not in violation of the constitutional principles mentioned.

The material portions of Act 189 provide:

> "When any real property which for any reason is exempt from taxation is leased, loaned or otherwise made available to and used by a private individual, association or corporation in connection with a business conducted for profit, * * *
> shall be subject to taxation in the same amount and to the same extent as though the lessee or user were the owner * * *."
>
> "Taxes shall be assessed to such lessees or users of real property and collected in the same manner as taxes assessed to owners of real property, except that such taxes shall not become a lien against the property."

It is true that in the first provision quoted, the meaning is not completely clear, obviously because, in the process of going through the legislation "mill" the words "the lessee or user of such property" were accidentally dropped in recopying, instead of appearing just before the words "shall be subject to taxation" after the asterisks above. The meaning and purpose is nevertheless clear from the enactment as a whole.

It would serve no necessary purpose to analyze and quote from the decisions which I consider controlling and determinative of the issues upon which the case turns. In my opinion they justify the following conclusions:

The "incidence" of the tax falls not upon the United States, but upon plaintiff Borg-Warner, and the tax is not invalid because indirectly the "economic burden" falls upon the United States; the tax is not one upon the real estate, but upon the user; the tax is not discriminatory; it does not adversely affect any "sovereign power"; it creates no liability against the United States or any of its agencies or instrumentalities.

Some of the authorities supporting these conclusions are:

Federal Reserve Bank v. Revenue Department, 339 Mich. 587;

National Bank of Detroit v. Department of Revenue, 340 Mich. 573 (Appeal dismissed in U. S. Supreme Court May 23, 1955);
In re Fish's Estate, 219 Mich. 369;
Oklahoma Tax Com. v. Texas Co., 336 U.S. 342;
Federal Compress & Warehouse Co. v. McLean, 291 U. S. 17, 78 L. Ed. 622;
Colorado Nat. Bank v. Bedford, 310 U.S. 11, 84 L. Ed. 1067;
Annotation 23 A. L. R. 248;
Union Trust Co. v. Probate Judge, 125 Mich. 487;
Federal Land Bank v. Bismarck, 314 U. S. 95, 86 L. Ed. 65;
Esso Standard Oil Co. v. Evans, 345 U. S. 495, 97 L. Ed. 1174.

It follows that the tax is valid, and defendant is entitled to a judgment of no cause of action, with costs to be taxed.

I am also of the opinion that in any event, the motion to dismiss on the ground that plaintiffs have not exhausted their administrative remedies before bringing this suit is supported by the authorities. However, if the decision on the issue of validity is correct, it is not necessary to be further concerned about this point.

/s/ Herman Dehnke,
Circuit Judge, presiding by assignment.

Dated: August 23, 1955.

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51 IN CIRCUIT COURT OF WAYNE COUNTY

Judgment—Filed August 25, 1955

At a session of the Circuit Court for the County of Wayne held at the Court House, in the City of Detroit, on the 25th day of August, 1955, Honorable Herman Dehnke, Circuit Judge.

The parties being again present, the Court heard the conclusion of the testimony, the arguments of counsel and finds that the defendants did not undertake and promise as the plaintiffs have complained against them.

Therefore, it is adjudged that the plaintiffs take nothing by their suit and that the defendants recover their costs to be taxed, and have execution therefor.

/s/ Herman Dehnke,
Circuit Judge.

IN CIRCUIT COURT OF WAYNE COUNTY

Notice of Entry of Judgment—Filed August 25, 1955

To: Glenn M. Coulter,

Address: 1703 Ford Building,
Attorney for Plaintiff.

Please take notice that a judgment for no cause of action in the above entitled cause was this day entered in favor of the defendant and against the plaintiff with costs to be taxed.

Edgar M. Branigin, Clerk,
Dan I. Sejcik,
Deputy Circuit Court Clerk.

Date: .....

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52 IN CIRCUIT COURT OF WAYNE COUNTY

Order Denying Motion for New Trial—Filed September 21, 1955

At a session of said Court held at and in the City-County Building in the City of Detroit, Michigan, on the 21st day of September, 1955.

Present: Honorable Herman Dehnke, Circuit Judge, 23rd Judicial Circuit, presiding in Wayne County.

There having come on before me the matter of the motion for new trial presented by the co-plaintiffs above named, and respective counsel for all parties having appeared in open Court on the date fixed for hearing, and the Court having considered the matters raised in the brief in support thereof filed by the moving parties and being fully advised in the premises, now, therefore

It is ordered that the motion for new trial herein be and the same is hereby denied.

Herman Dehnke,
Circuit Judge, 23rd Judicial Circuit, presiding in Wayne County.

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53 IN CIRCUIT COURT OF WAYNE COUNTY

Certificate of Circuit Judge—Filed October 6, 1955

I, Herman Dehnke, Circuit Judge of the Twenty-Third Judicial District, and acting by assignment in the Third Judicial District as Circuit Judge, upon the hearing of the above case, do hereby certify that said action is one at law, was submitted to the Court on the facts, that a judgment was rendered for the defendant, and that the controversy actually involves more than five hundred ($500.00) dollars."

Dated, September 29, 1955.

(Sgd.) Herman Dehnke
Circuit Judge.

IN CIRCUIT COURT OF WAYNE COUNTY

Stipulation Re Exhibits—Filed November 10, 1955

It is hereby stipulated by and between the parties to this cause, under the provisions of Michigan Court Rule 66 (Section 11) that this Court may enter an order directing the Clerk of the Circuit Court for the County of Wayne to transmit directly to the Supreme Court of Michigan for its use in determining the within appeal the following described documents, heretofore received in evidence on the trial of said cause, to wit:

1. Co-plaintiffs Exhibit "A"—photostatic copy of lease NOy (R)—60040, dated March 8, 1948, executed by and between the United States of America, as Lessor, and Borg-Warner Corporation as Lessee.

54 2. Co-plaintiffs Exhibit "B"—first amendment to lease NOy (R)—60040, dated December 1, 1952.

3. Defendants Exhibit "2"—photostatic copy of City of Detroit Personal Property Tax Roll covering premises at 11111 French Road, Detroit, Michigan, for the year 1954.

(Sgd.) Glenn M. Coulter,
Attorney for Borg-Warner Corporation (Detroit Gear Division), an Illinois corporation, Co-plaintiff and Co-appellant,
1703 Ford Building,
Detroit 26, Michigan.

(Sgd.) Fred W. Kaess,
United States Attorney,

(Sgd.) John L. Owen,
Assistant United States Attorney;
Attorneys for United States of America Co-plaintiff and Co-appellant.
869 Federal Building,
Detroit 31, Michigan.

(Sgd.) Julius C. Pliskow,
Attorney for City of Detroit, a Michigan Municipal Corporation,
Defendant and Appellee,
601 City-County Building,
Detroit 26, Michigan.

Dated: November 10, 1955.

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55 IN CIRCUIT COURT OF WAYNE COUNTY

Order Transmitting Exhibits—November 10, 1955

(File Endorsement Omitted)

At a session of said Court held at and in the City-County Building in the City of Detroit, Michigan, on the 10th day of November, A. D., 1955.

Present: Honorable Ira W. Jayne, Circuit Judge.

On reading and filing the attached stipulation of the parties hereto and the Court being of the opinion that the

expense and difficulty of copying the documents described in said stipulation is sufficient to justify the within order, and the Court being advised in the premises;

It is hereby ordered that the Clerk of this Court be and he is hereby directed to transmit the following described exhibits received in evidence on the trial in this cause directly to the Supreme Court of Michigan for use in determining the within appeal, in lieu of the same being copied and incorporated in the printed record on appeal, to-wit:

1. Co-plaintiffs Exhibit "A"—photostatic copy of lease NOy (R)—60040 dated March 8, 1948, executed by and between the United States of America, as Lessor, and Borg-Warner Corporation as Lessee.

2. Co-plaintiffs Exhibit "B"—first amendment to lease NOy (R)—60040, dated December 1, 1952.

3. Defendants Exhibit "2"—photostatic copy of City of Detroit Personal Property Tax Roll covering premises at 11111 French Road, Detroit, Michigan, for the year 1954.

(Sgd.) I. A. W. Jayne,
Circuit Judge.

Dated: November 10, 1955.

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56 IN CIRCUIT COURT OF WAYNE COUNTY

Claim of Appeal to the Supreme Court of Michigan—Filed October 6, 1955

United States of America and Borg-Warner Corporation (Detroit Gear Division), and Illinois corporation, co-plaintiffs, claim an appeal from the judgment entered on the 25th day of August, A. D. 1955, and from order denying motion for new trial filed herein by co-plaintiffs entered on the 21st day of September, 1955, by the Circuit Court for the County of Wayne. Co-appellants take a general appeal.

Dated at Detroit, Michigan, this 6th day of October, A. D., 1955.

(Sgd.) Glenn M. Coulter,
Attorney for Borg-Warner Corporation (Detroit Gear Division), an Illinois corporation, Co-plaintiff and Co-appellant,
(Sgd.) Fred W. Kaess,
United States Attorney,
(Sgd.) Orrin C. Jones,
Assistant United States Attorney,
Attorneys for United States of America Co-plaintiff and Co-appellant.

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57 IN CIRCUIT COURT OF WAYNE COUNTY

Statement of Reasons and Grounds for Appeal—Filed November 16, 1955

Each appellant, for itself, claims the following reasons and grounds for appeal:

(1) The Court erred in entering a judgment of no cause of action.

(2) The Court erred in holding that Act No. 189 of the Public Acts of Michigan for 1953, as here applied, was not repugnant to the Constitution of the United States and invalid as imposing a tax upon property of the United States which is immune from taxation by any state or its subdivision.

(3) The Court erred in holding that Act 189 was not an ad valorem tax upon property owned by the United States and invalid, but was a valid specific tax upon the lessees or users of otherwise tax-immune property.

(4) The Court erred in not holding that Act 189 is unconstitutional as attempting indirectly to impose a tax upon property, or interests in property, owned by the United States, by the mere device of stating that it is taxing the lessees or users thereof to the same extent and in the same manner as though such lessee or users, and not the United States, were the owner of such property.

(5) The Court erred in not holding that, if Act 189 may be construed as imposing a privilege tax upon the lessee

or user of immune property, it is invalid because it is discriminatory in its purpose and effect. It is not imposed upon all lessees or users of real property but
58 is primarily directed at users of federally-owned property for the purpose of collecting from them the taxes which the State under the Federal Constitution cannot assert against or collect from the United States with respect to its property.

(6) The Court erred in not holding that, if Act 189 may be construed as imposing a privilege tax, it is invalid as here applied for it would impose a tax for the privilege of using federal property placed in the possession of the user under the terms of a federal statute designed and enacted to accomplish a federal purpose. The exercise of this constitutional right of the Congress to dispose of and make all needful rules and regulations respecting the property belonging to the United States may not be made the subject of a privilege tax by any state and Act 189 constitutes a direct interference with the exercise of this federal function.

(7) The Court erred in not holding that Act 189 is limited in application solely to properties which are within the power of the State to tax but which have been made tax exempt by the State as a matter of legislative grace, and is not applicable to property which, absent express Congressional consent, is immune from state taxation by virtue of the Federal Constitution.

(8) The Court erred in holding that Act 189, as here applied, is valid, notwithstanding that the United States has exercised its powers of legislation with respect to the property in question in such a manner as to provide that the state may tax to the extent of the value of the lessee's interest but not in the same amount and to the same extent as though the lessee or user were the owner of the property. Act 189 is in conflict with the federal
59 legislation and inoperative for the federal legislation under the Constitution of the United States is exclusive in its application.

(9) The Court erred in not holding that Act 189 is invalid as being repugnant to the Constitution of the United States in that it violates the due process and equal protec-

tion clause of the Fourteenth Amendment to such Constitution by taxing to the appellant, Borg-Warner property or the value of property which it does not own but which the Act conclusively presumes it does own.

(10) The Court erred in not holding that, under the Michigan Constitution, Act 189, if it imposes an ad valorem tax taxable to the lessee or user, is invalid because it provides for an assessment of the interest of such lessee or user, not based upon the true value of his leasehold interest but upon the entire fee simple interest of the owner, and therefore is violative of Article X, Section 7, of such Constitution which requires that such interest be assessed at its true cash value.

(11) The Court erred in holding that the motion to dismiss, based upon the claim that the appellants did not exhaust their administrative remedies before bringing suit, is supported by the authorities where the tax was paid under protest and an action in assumpsit timely brought to recover the tax based upon the invalidity of the statute and complete absence of power on the part of the appellant to assert the tax.

(12) The Court erred in not granting the motion for new trial filed herein by appellants, for each and all of the reasons hereinbefore set forth.

60 And, for the errors aforesaid, each appellant, for itself, says that the judgment entered in the above cause should be reversed, vacated and held for naught.

(Sgd.) Glenn M. Coulter,
Attorney for Borg-Warner Corporation (Detroit Gear Division), an Illinois corporation, Co-plaintiff and Co-appellant.
(Sgd.) Fred W. Kaess,
United States Attorney,
(Sgd.) John L. Owen,
Assistant United States Attorney,
Attorneys for United States of America Co-plaintiff and Co-appellant.

Dated: November 10, 1955.

61 IN CIRCUIT COURT OF WAYNE COUNTY

Certificate of Circuit Judge—Filed November 10, 1955

I, Ira W. Jayne, Circuit Judge of the Third Judicial District of Michigan, acting for and on behalf of Herman Dehnke, Circuit Judge of the Twenty-Third Judicial District of Michigan, before whom said cause was tried, and acting herein with the consent of counsel for the parties to this cause, do hereby certify that the foregoing agreed statement of facts is a true settlement of the facts made by the parties hereto through their respective attorneys of record; that the foregoing was duly settled by me on November 10, 1955, within the time allowed by law and in pursuance of an order entered in said cause extending the time to settle the bill of exceptions herein to and including November 11, 1955; that the foregoing constitutes a true record of the trial proceedings in said cause upon which the Court's opinion set forth herein and whose judgment is now being appealed was based; and that the reasons and grounds for appeal were annexed to said agreed statement of facts at the time the same was certified by me.

Ira W. Jayne,
Circuit Judge.

Dated: November 10, 1955.

Approved as to form and content:

Paul T. Dwyer,
Corporation Counsel,

By: (Sgd.) Julius C. Pliskow,
Assistant Corporation Counsel.

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63 IN SUPREME COURT OF STATE OF MICHIGAN.

UNITED STATES OF AMERICA and BORG-WARNER CORPORATION (Detroit Gear Division), an Illinois corporation,
Co-Plaintiffs and Co-Appellants

v.

CITY OF DETROIT, a municipal corporation,
Defendant and Appellee

Before the Entire Bench.

Opinion—May 14, 1956

DETHMERS, C.J.

The United States owns real estate consisting of an industrial plant, building and grounds in Detroit. A portion of it is leased to plaintiff Borg-Warner Corporation, which uses it exclusively for manufacturing purposes in its business conducted for profit. The lease provides that Borg-Warner may deduct from rent to United States any taxes assessed against and paid by Borg-Warner under PA 1953, No. 189 (CLS 1954, §§ 211.181, 211.182 [Stat Ann 1955 Cum Supp §§ 7.7(5), 7.7(6)]), by reason of its use of the premises, that it will cooperate with United States to contest validity of such taxes and pay same under protest, if required by United States, and that it will repay United States any such taxes refunded.

Act No. 189 reads:

"AN ACT to provide for the taxation of lessees and users of tax-exempt property.

"*The People of the State of Michigan enact:*

"211.181 Taxation of lessees and users of tax-exempt property; exception. [M.S.A. 7.7(5)]

"SEC. 1. When any real property which for any reason is exempt from taxation is leased, loaned or otherwise made available to and used by a private individual, association or corporation in connection with a business conducted for profit, except where the use is by way of a concession in or relative to the use of a public airport, park, market, fair ground or similar property which is available to the use of the general public, shall be subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of such property: Provided, however, That the foregoing shall not apply to federal property for which payments are made in lieu of taxes in amounts equivalent to taxes which might otherwise be lawfully assessed or property of any state-supported educational institution.

"211.182 Assessment and collection; action of assumpsit. [M.S.A. 7.7(6)]

tional as constituting imposition of a tax on immune property of United States. The court said, *inter alia:*

"It is not contended that the scheme of taxation employed by Pennsylvania is anything other than the old and widely used ad valorem general property tax. * * * This form of taxation is not regarded primarily as a form of personal taxation but rather as a tax against the property as a thing. Its procedures are more nearly analogous to procedures *in rem* than to those *in personam*. While personal liability for the tax may be and sometimes is imposed, the power to tax is predicated upon jurisdiction of the property, not upon jurisdiction of the person of the owner, which often is lacking without impairment of the power to tax. In both theory and practice the property is the subject of the tax and stands as security for its payment.

"The Pennsylvania statutes embody this scheme of taxation. They are a century old. The basic provision reads: 'The following *subjects and property* shall . . . be valued and assessed, and *subject to taxation.*' Taxes are 'declared to be a *first lien on said property.*' (Emphasis supplied.) It is only under these legislative provisions that the tax in question is laid.

"The procedure of the assessors is consistent with no other theory than that the machinery itself was being assessed and taxed exactly as land was being assessed and taxed. * * *

"We hold that the substance of this procedure is to lay an ad valorem general property tax on property owned by the United States. * * *

"Mesta has some legal and beneficial interest in this property. It is a bailee for mutual benefit. Whether such a right of possession and use in view of all the circumstances could be taxed by appropriate proceedings we do not decide. * * *

"We think, however, that the Government's property interests are not taxable either to it or to its bailee. The 'Government' is an abstraction, and its possession of property largely constructive. Actual possession and custody of Government property nearly always are in someone who is not himself the Government but acts in its

behalf and for its purposes. He may be an officer, an agent, or a contractor. *His personal advantages from the relationship by way of* salary, profit or *beneficial personal use of the property may be taxed as we have held.* But neither he nor the Government can be taxed for the Government's property interest." (Emphasis supplied.)

We agree with defendant that Allegheny is distinguishable from the instant case in controlling respects. To begin with, the hiatus in Section 1 of Act 189, resulting from failure to express the subject of the predicate "shall be subject to taxation", which had been expressed in the bill as passed in the House, was apparently occasioned by inadvertent omission in the Senate. That subject was clearly intended to be, as in the House draft, "the lessee or user of such property." This is evident from the title of the act as well as from Section 2, which provides that the taxes shall be assessed to the lessees or users of real property. Thus, the Michigan act provides that it is the users of tax-exempt property who shall be subject to taxation, as contrasted with the Pennsylvania act considered in Allegheny, which provided that certain property should be subject to taxation. In further contrast with Allegheny, and stated in the converse of the language therein, the tax at bar is a form of personal taxation and not a tax against the property as a thing—its procedures are more analogous to procedures *in personam* than *in rem*—the power
67 to tax is not predicated upon jurisdiction of the property, but upon jurisdiction of the user—the property is not the subject of the tax and does not stand as security for its payment. These distinctions between Allegheny and the case at bar we think go to the roots of the problem of the nature of the taxes in the two cases and leave the holding in Allegheny that the tax there was on United States property without application here.

In Educational Films Corp. v. Ward, 282 US 379, the court upheld a New York franchise tax on certain classes of domestic corporations, payable each year in advance and measured by the corporation's entire net income of the preceding year, which, in the case of plaintiff therein, was derived in part as royalties from copyrights granted by the United States. The court held that, assuming Federal

copyrights and income therefrom to be immune from State taxation as instrumentalities of the Federal government, the franchise tax in question insofar as measured by royalties from copyrights was not void as a tax on Federal instrumentalities. In so holding the court said:

"If we look to the operation of the present statute, it is plain that it can have no application independent of the corporation's enjoyment of the privilege of exercising its franchise. If appellant had ceased to do business before November 1, 1929, it would not have been subject to any tax under this statute, although it had received, during its preceding fiscal year, income which the statute makes the measure of the tax. Since it can be levied only when the corporation both seeks or exercises the privilege of doing business in one year and has been in receipt of net income during its preceding fiscal year, the tax, whatever descriptive terms are properly applicable to it, obviously is not exclusively on income apart from the franchise."

Applying the test of the quoted language here, it is plain that Act 189 can have no application independent of Borg-Warner's enjoyment of the privilege of using the real estate in connection with its business conducted for
68 profit, and that the tax is, therefore, not an *ad valorem* tax on real property of United States and void accordingly, but a specific tax on Borg-Warner's privilege of using it and, hence, valid. This squares with the above quoted language from Allegheny to the effect that Mesta enjoyed a right of possession which the court seemed to suggest, without deciding, could be taxed by the State, and the further statement that it had theretofore held that a contractor's personal advantages from the beneficial personal use of United States property may be taxed by a State. That the economic burden of the tax, as distinguished from its legal incidence, happens to fall on United States is no barrier to its validity. James v. Dravo Contracting Co., 302 US 134; Alabama v. King & Boozer, 314 US 1; Esso Standard Oil Co. v. Evans, 345 US 495.

Plaintiffs say, however, that even if Act 189 stated in express terms that it was imposing a specific tax on the privilege of using the immune United States property, still it would be unconstitutional because the full value of the

property is used as the measure in assessing the tax, thus evidencing a legislative intent to accomplish indirectly what may not be done directly, namely, to tax property of the United States. In this connection they cite Pittman v. Home Owners' Loan Corp., 308 US 21; Federal Land Bank v. Crosland, 261 US 374; New Jersey Insurance Co. v. Division of Tax Appeals, 338 US 665; Missouri v. Gehner, 281 US 313. Plaintiffs say that, however phrased, the act is, in fact, aimed at and intended to reach the property of United States in a manner held invalid in Macallen Co. v. Massachusetts, 279 US 620, and Miller v. Milwaukee, 272 US 713. We come, then, to the same position confronted by the court in Educational 69 Films Corp. v. Ward, supra, when it said:

"Hence, we pass to the chief objection urged against it, that such a tax, however described, and even though deemed to be a tax on franchises, is invalid so far as it is measured by income derived from a federal instrumentality."

Consider, then, these cases cited by plaintiffs. Involved in the Pittman and Federal Land Bank Cases were State taxes imposed on mortgages owned by Federal instrumentalities. In the New Jersey Insurance Company Case a New Jersey statute was considered which provided for an intangible personal property tax which in that case had been assessed against tax-exempt United States bonds held by a domestic corporation, the court pointing out that the tax was not considered by the New Jersey legislature or taxing authorities as a privilege or franchise tax. Likewise, in Missouri v. Gehner the tax was on net assets of insurance companies, including exempt United States bonds held by them. In Miller v. Milwaukee, the Wisconsin statute involved required a Wisconsin corporation to pay a tax on its income, excepting the portion thereof received from United States bonds. The income was later distributed as dividends to stockholders. The Wisconsin statute taxed the stockholders on such dividends only to the extent that they represented income of the corporation derived from tax-exempt United States bonds. The court held the tax on stockholders to that extent void because it was aimed solely at exempt income from United States bonds. The Macallen Case presented an amendment to a State tax-

ing act which was held invalid because its sole purpose was to reach income from tax-exempt United States bonds. In none of these cases was the object of the tax nor the legislative purpose sought to be served the same as at bar. As defendant in the instant case properly points
70 out, lessees of private nontax-exempt real estate ordinarily bear the tax burden thereon either by direct payment thereof under lease requirements or by payment of rent sufficient to include the tax; and defendant reasons that the legislative intent here was to put such lessees of private property used by them in business conducted for profit on an equal footing with users of tax-exempt government property used by them in business conducted for profit, thus avoiding discrimination against the former and eliminating an element of unfair competition between them by requiring an equal tax burden as to both; and defendant urges that this does not evidence an intent on the part of the legislature to aim at or reach United States property for taxation but only to treat both classes of users equally. It is obvious that each of the cases cited by plaintiffs, as just above considered, is distinguishable from the instant case because in each of them either a local tax was sought to be imposed directly on immune property or income as such, or the sole purpose of the tax act was to reach it indirectly, whereas here, as previously considered, the tax is not on the immune property but on the privilege of using it, and the act imposing it is not aimed at that property but, rather, at removing a discrimination between users of private and of public property. That such a privilege tax is not only permissible, as appears from the Allegheny and Educational Films Cases above considered, but that it is valid even though measured by the full value of the immune property or income is settled by Plummer v. Coler, 178 US 115; Home Insurance Co. v. New York, 134 US 594; Educational Films Corp. v. Ward, supra; Flint v. Stone Tracy Co., 220 US 107; Pacific Co. v. Johnson, 285 US 480. In Plummer a State inheritance tax was upheld even though
71 measured by the full value of tax-exempt United States bonds included in a bequest. In Home Insurance Company the court upheld a corporate franchise tax measured by the corporation's dividends and capital

stock, including the full value of tax-exempt United States securities held by the corporation. In Flint and in Pacific corporate franchise taxes were upheld which were measured by income derived in part from tax-exempt United States securities. In Educational Films Corp. v. Ward, supra, the court upheld a corporate franchise tax measured by immune income from Federal copyrights. In each of these cases the privilege tax was held valid despite use of a measure which included the full value of immune property or income.

Plaintiffs also urge that Act 189 violates Mich Const. 1908, art. 10, § 7, in imposing against a lessee an *ad valorem* tax not based on the cash value of his leasehold but of the entire fee simple interest of the owner. Holding, as we do, that the tax imposed is not *ad valorem* on the property nor on the leasehold, but a specific tax on the privilege of using the property, the mentioned constitutional provision is without application. Shivel v. Kent County Treasurer, 295 Mich 10. See, also, Walcott v. People, 17 Mich 68, and Kitson v. Ann Arbor, 26 Mich 325.

Affirmed, with costs to defendant.

Justice Reid took no part in this decision.

Signed: John R. Dethmers.
Edward M. Sharpe.
Harry F. Kelly.
Eugene F. Black.
Leland W. Carr.
Emerson R. Boyles.
Talbot Smith.

(File Endorsement Omitted

72 IN THE SUPREME COURT OF THE STATE OF MICHIGAN

Present the Honorable

JOHN R. DETHMERS,
Chief Justice,

EDWARD M. SHARPE,
TALBOT SMITH,
EMERSON R. BOYLES,
HARRY F. KELLY,
LELAND W. CARR,
EUGENE F. BLACK,
Associate Justices.

46702

UNITED STATES OF AMERICA, ET AL., *Plaintiffs and Appellants,*

vs.

CITY OF DETROIT, *Defendant.*

Remittitur—May 14, 1956

The records and proceedings in this cause having been brought to this Court by appeal from the Circuit Court for the County of Wayne, and the same, and the grounds of appeal specified therein, having been seen and inspected and duly considered by the Court, and it appearing to this Court that in said record and proceedings, and in the giving of judgment in said Circuit Court, there is NO ERROR, Therefore it is ordered and adjudged that the judgment of said Circuit Court for the County of Wayne be and the same is hereby in all things affirmed, and that the defendant do recover of the plaintiffs, its costs, to be taxed, and that it have execution therefor.

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74 IN THE SUPREME COURT OF THE STATE OF MICHIGAN

(Title Omitted)

Notice of Appeal—Filed August 9, 1956

75 I. Notice is hereby given that United States of America and Borg-Warner Corporation, Co-Appellants above named, hereby appeal to the Supreme Court

of the United States from the final judgment of the Supreme Court of the State of Michigan affirming the judgment of the Circuit Court of Wayne County of no cause of action, which judgment of the Supreme Court was entered May 14, 1956.

This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. The record as settled by the Circuit Court of Wayne County.

2. Judgment (Remittitur).

3. Opinion.

4. This notice of appeal and proof of service.

76 III. The following questions are presented by this appeal:

1. Act 189 of the Public Acts of Michigan for 1953 (CLS 1954, Sections 211.181, 211.182 [Stat. Ann. 1955 Cum. Supp., Sections 7.7(5), 7.7(6)]), as here applied is repugnant to the Constitution of the United States and invalid. It imposes a tax on property of the United States which, lacking Congressional permission, is immune from taxation by any state or its subdivisions.

2. If Act 189 may be construed as imposing a privilege tax, it is invalid as here applied for it would impose a tax for the privilege of using federal property placed in the possession of the user under the terms of a federal statute designed and enacted to accomplish a federal purpose. The exercise of this constitutional right of the Congress to dispose of and make all needful rules and regulations respecting the property belonging to the United States may not be made the subject of a privilege tax by any state and Act 189 constitutes a direct interference with the exercise of this federal function.

3. The United States by express statute has exercised its powers of legislation with respect to the property in question in such a manner as to provide that the state may tax to the extent of the value of the lessee's interest but not in the same amount and to the same extent as though the lessee or user were the owner of the property. Act 189 which taxes the lessee to the extent of the full value of the property is in conflict with the federal law and invalid.

4. If Act 189 may be construed as imposing a privilege tax on the lessee or user of immune federal property, it is invalid because it is discriminatory in its purpose and effect. It is not imposed on all lessees or users of
77 real property but is primarily directed at federally-owned property for the purpose of collecting from the lessees or users taxes which the State under the federal constitution cannot assert against or collect from the United States or its property.

5. Act 189 violates the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution by taxing to Co-Appellant, Borg-Warner Corporation, property, or the value of property, which it does not own but which the Act conclusively presumes it does own.

FRED W. KAESS
Fred W. Kaess, *United States Attorney for the Eastern District of Michigan*

JOHN L. OWEN
Assistant United States Attorney

Attorneys for Co-Appellant United States of America.

Coulter & Coulter

By THOMAS E. COULTER
Thomas E. Coulter

Attorneys for Co-Appellant, Borg-Warner Corporation.

78 **Proof of Service (Omitted in Printing)**

79 IN THE SUPREME COURT OF THE STATE OF MICHIGAN

(Title Omitted)

Cross-Designation By Appellee of Additional Matters to Be Included in Record—filed August 22, 1956

TO THE CLERK OF THE SUPREME COURT OF THE STATE OF MICHIGAN:

You are hereby requested, pursuant to the provisions of Rule 12 of the Rules of the Supreme Court of the United States, to incorporate into the transcript of record, on the appeal herein, in addition to the portions of the record designated by co-appellants herein in their notice of appeal, the following:

1. Co-Plaintiffs' Exhibit "A"—photostat copy of lease NOy(R)—60040 dated March 8, 1948, executed by and between the United States of America, as Lessor and Borg-Warner Corporation, as lessee.

2. Co-Plaintiffs' Exhibit "B"—first amendment to lease NOy(R)—60040 dated December 1, 1952.

3. Defendant's Exhibit "2"—photostat copy of City of Detroit Personal Property Assessment Roll for 1954 covering premises at 11111 French Road, Detroit, Michigan.

80 4. This Cross-Designation together with Proof of Service.

PAUL T. DWYER,
Corporation Counsel
BERT R. SOGGE
JULIUS C. PLISKOW
ROGER P. O'CONNOR
ANDREW DIMAGGIO
Assistants Corporation Counsel

trial Reserve Plant (hereinafter called NIRP), formerly known as Clayton & Lambert Manufacturing Company, Detroit, Michigan, located at 11111 French Road, Detroit, Michigan; and

WHEREAS, the Secretary of the Navy (hereinafter called Secretary) has determined that the NIRP is not surplus to the needs of the Department within the meaning of the Act of Congress of October 3, 1944 (58 Stat. 765), but is not, for the time being, required for public use; and

WHEREAS, it has been determined that it will be in the public interest to lease the NIRP to Borg-Warner upon the terms and conditions hereinafter set forth; and

WHEREAS, this lease is made under the authority of the Act of Congress of August 5, 1947 (61 Stat. 774; 34 U.S.C. sec. 522a), and the approval of the Armed Services Committees of the Congress thereto has been obtained in accordance with the Act of Congress of April 4, 1944 (58 Stat. 189, 190):

NOW, THEREFORE, in consideration of the premises and of the terms, covenants and conditions hereinafter set forth, the parties hereto do agree as follows:

84. ARTICLE 1. *Leased Property.* The Government does hereby lease, rent and demise to Borg-Warner, and Borg-Warner does hereby hire and rent from the Government the following described property:

All that certain piece or parcel of land situate in the City of Detroit, County of Wayne, and State of Michigan, being parts of Lots Numbered Six, Seven, Eight and Nine of Engel's Subdivision of a portion of Fractional Section Fifteen, Township One South, Range Twelve East, formerly in Hamtramck Township, according to the plat thereof recorded in Liber 11 of Plats, Page 73, of the records of said Wayne County, bounded and described as follows, to wit:

BEGINNING at a point within the lines of French Road (eighty-six feet wide) at the intersection of the original center line of said French Road (formerly sixty-six feet wide) with the southeasterly line of said Engel's Subdivision;

extending thence South sixty-three degrees thirty-eight minutes thirty seconds West along said southeasterly line of Engel's Subdivision, on a line partly crossing said French Road and partly within the lines of Madola Avenue (fifty feet wide) parallel with and thirty feet southeastwardly from and measured at right angles to the northwesterly line of said Madola Avenue, the distance of one thousand four hundred and sixteen feet and fifty-two one-hundredths of a foot to a point;

thence the following five courses and distances by other land of The Pennsylvania, Ohio and Detroit Railroad Company:

(1) North twenty-six degrees twenty-one minutes thirty seconds, West, partly crossing said Madola Avenue, the distance of fifty-two feet to a point;

(2) Northeastwardly, by a curve to the left, having a radius of four hundred and sixty-six feet and thirty-four one hundredths of a foot, the initial tangent of which bears North sixty-three degrees thirty-eight minutes thirty seconds East the distance along said curve of two hundred and six feet and twenty-three one-hundredths of a foot to a point;

(3) North thirty-eight degrees sixteen minutes thirty seconds East, crossing the dividing line between said Lots Numbered Six and Seven, the distance of one hundred and fourteen feet and ninety-two one-hundredths of a foot to a point;

(4) North twenty-six degrees seven minutes West the distance of three hundred and twenty-five feet and twenty-four one-hundredths of a foot to a point distant sixty-six feet southeastwardly from a point in and measured at right angles to the northwesterly line of said Engel's Subdivision; and

(5) North sixty-three degrees fifty-three minutes East, on a line parallel with and sixty-six feet southeastwardly from, and measured at right angles to the said northwesterly line of Engel's Subdivision, crossing the dividing lines between said Lots Numbered Seven and Eight and of said Lots Numbered Eight and Nine, and partly recrossing said French Road, the distance of one thousand and thirty-three feet and forty-eight one hundredths of a foot to the said original center line of French Road;

and thence South thirty-five degrees forty-nine minutes forty seconds East along the same, being the northeasterly line of said Lot Number Nine, on a line parallel with and thirty-three feet northeastwardly from and measured at right angles to the southwesterly line of said French Road (eight-six feet wide) the distance of four hundred and seventy-three feet and sixty-four one-hundredths of a foot to the place of beginning, containing twelve acres and one hundred and sixty one-thousandths of an acre, more or less, of which three hundred and fifty-nine one-thousandths of an acre, more or less, is included within said French Road and Nine hundred and seventy-seven one-thousandths of an acre, more or less, is included within said Madola Avenue;

together with all buildings, improvements, utility lines, railroad tracks and any and all other easements or appurtenances thereunto belonging; together with the right to use the spur track owned by the Pennsylvania Railroad Company running through the premises and connecting with the main line of the Railroad Company, provided, however, that Borg-Warner assume and discharge any and all charges made by the Railroad Company for the use of this spur line; less and except, however, an Office Building and passage thereto.

Portions of the NIRP are sometimes hereinafter referred to as the "Facilities", the "Excepted Area," the "Manufacturing Area," the "Storage Area," and the "Parking Area". As hereinafter used, the "Facilities" means all the leased property as described above; the "Excepted Area" means the office building and the passageway above excluded from the leased property, said Area being delineated in yellow on drawing attached hereto as Exhibit "A", dated June 22, 1949 and bearing the legend "Clayton and Lambert Mfg. Co., Plant, Detroit, Michigan NOrd(F)-1056;" the "Manufacturing Area" means that portion of the Facilities delineated in red on Exhibit "A" hereto; the "Storage Area" means that portion of the Facilities delineated in purple on Exhibit "A" hereto; and the "Parking Area" means that portion of the Facilities laid out for or heretofore ordinarily devoted to the parking of vehicles.

ARTICLE 2. *Rights of Access and Use By the Government.*

The Government shall have the right to use in common with Borg-Warner so much of the Parking Area as is necessary to park cars and vehicles belonging to the Government, or its employees, and invitees by reason of its operations in the Excepted Areas.

At all times while this lease is in effect the Government shall have the right of access to the Facilities in order fully to exercise and to fulfill all its rights and obligations under this lease and to protect its interests thereunder and for any other purposes not inconsistent with the proper use of the Facilities by Borg-Warner.

ARTICLE 3. *Term.* The term of this lease shall be for a period of five (5) years, commencing on the 8th day of March, 1948, and ending on the 7th day of March, 1953, unless sooner terminated as herein provided. Borg-Warner shall have the option to extend the term hereof for three (3) additional terms of five (5) years each, by giving not less than two hundred and seventy (270) days written notice to the Department prior to the expiration of the term of this lease, subject to the conditions of Article 8.

86 ARTICLE 4. *Adaption of Facilities.* Borg-Warner shall, at its own cost and expense, and as the Government may direct, remove all Government-owned machine tools, equipment and materials, presently located on the property, from the Manufacturing Area and shall store all such property in the Storage Area. In this connection, Borg-Warner shall prepare and furnish the Government a "machine tool layout", showing present position and location of all such machine tools, equipment and materials, and thereafter a "storage layout" showing position of the machine tools, equipment and materials as stored. Borg-Warner shall further identify the machine tools, equipment and materials, wherever possible, with numbers corresponding to numbers shown on the "machine tool layout" and "storage layout". In addition, Borg-Warner shall, at its own cost and expense, erect a suitable barrier, constructed of material such as adequate woven wire fencing, or rock wallboard, segregating the tools within the Storage

Area from the Manufacturing Area, so as to properly protect the stored property of the Government.

ARTICLE 5. *Use.* Borg-Warner shall have the right to use the Manufacturing Area in its operations for the manufacture of automotive parts, agricultural implements and similar products and for no other purpose; shall use the Storage Area for the storage and maintenance of Government-owned machine tools, equipment and material and for no other purpose; and shall have the right to use the Parking Area for the accommodation of vehicles and for no other purpose; subject, however, to the Government's rights of use and entry stated in Article 2, *Provided, however*, that in the event the Government, by removal of the machine tools, equipment, and materials to be stored in the Storage Area, clears and makes available for use any of the space in the Storage Area, such space shall be deemed added to the Manufacturing Area, and Borg-Warner shall pay rent therefor in accordance with the provisions of Article 6 hereinbelow, *Provided*, further, that such space is adjacent to the Manufacturing Area or other parts of the Storage Area previously being used by Borg-Warner and such space in each case is in units of not less than 5,000 square feet.

Borg-Warner covenants and agrees that it recognizes and accepts the status of the NIRP as a national defense plant retained as a "standby facility" against a national emergency to be maintained at all times in such manner and condition so as to permit prompt reactivation for the manufacture of ordnance material, and that it will not perform any acts other than in accordance with the terms of this lease, which might be harmful to or reduce or impair such status.

ARTICLE 6. *Rent.* Borg-Warner shall pay as rent for the Facilities the sum of twenty thousand four hundred ($20,400.00) dollars for the period beginning March 8, 1948, and ending March 7, 1949, and for each lease year thereafter, the sum of two thousand four hundred ($2,400.00) dollars payable in advance. *Provided*, however, that if additional space is added to the Manufacturing Area by the removal of Government-owned materials stored in the Storage Area, as provided for hereinabove in Article 4, Borg-

Warner shall pay additional rent therefor at the rate of fifty-four and one half cents (54½) per square foot per annum, payable in advance.

87 Cash payments provided for in this Article shall be by certified check made payable to the Treasurer of the United States and presented to the Officer in Charge of this Contract for transmittal to the Officer in Charge, U. S. Navy Regional Accounts Office, Washington 25, D. C.

ARTICLE 7. *Maintenance.* (a) Borg-Warner shall protect, preserve, maintain and repair the Facilities and the Government-owned machine tools, equipment, and materials stored therein, in accordance with sound industrial practice, and as the Government may from time to time reasonably require or direct.

(b) In complying with this Article, Borg-Warner shall not (except as provided in (c) hereinbelow), be obligated to expend with respect to the items listed in paragraph (c) hereinbelow, a sum in excess of $43,600.00 during the first year of the term of this lease, $47,600.00 during the second year of the term of this lease, and $45,600.00 during the third and each succeeding year of the term of this lease, each amount hereinafter being referred to as the "maximum amount to be expended."

(c) Pursuant to the foregoing paragraph, only the costs to Borg-Warner of performing the following obligations shall be allowed as a credit against the maximum amount to be expended:

(i) Repairs to boilers, utility lines, service lines, and other items necessary to place the plant in condition for the purpose for which it is leased hereunder, *Provided*, that the cost of such repairs shall only be allowed as a credit against the maximum amount to be expended during the first and second years of the term of this lease.

(ii) Preservation, protection, maintenance and repair (including day to day and long term maintenance), of the Storage Area and the Government-owned machine tools, equipment and materials stored therein.

(iii) Long term maintenance on the balance of the Facilities.

Long term maintenance within the meaning of this Article is defined as any item of maintenance (including repair, partial or complete replacement, overhaul or rehabilitation), the recurrence of which is not anticipated within the next succeeding one year period, and the cost of which, when taken together with the cost of similar items which would normally be performed at or about the same time, or as a part of a single project, in accordance with sound industrial practice, approximates $250.00 or more. Long term maintenance shall in no event include day to day operational maintenance, janitorial service, garbage and trash collection and disposal, and cleanup work, which shall be performed by Borg-Warner, the cost of which shall not, except as provided in subparagraph (ii) of this paragraph, be allowed as a credit against the maximum amount to be expended. In determining the maximum amount to be expended hereunder, there shall be allowd as credits against such amount only the direct costs of labor and material, exclusive of overhead, properly allocable to the performance of Borg-Warner's obligations under this Article 7.

88 (d) Borg-Warner shall notify the Government immediately of any circumstances or conditions which require any work of protection, preservation, maintenance, or repair, concerning which the Government has not theretofore issued directions to Borg-Warner under this Article. In the event of an emergency in or upon or affecting the Facilities, involving imminent danger to persons or property, Borg-Warner shall immediately undertake and perform such work as may be reasonably necessary under the circumstances, where time does not permit Borg-Warner to obtain prior directions from the Government for the performance of such work.

(e) In the event that Borg-Warner's expenditures in complying with its obligations under this Article (computed as aforesaid) do not in any year of the term of this lease equal or exceed the applicable amount stated in (b) above, which Borg-Warner could be required to expend hereunder during such year, such difference or deficiency

shall be added to the applicable amount stated in (b) above, for the succeeding year or years.

(f) Upon the expiration or earlier termination of this lease, Borg-Warner shall remain obligated, within the maximum amount to be expended, as this amount may have been augmented under subparagraph (e) above, for the performance, within a reasonable time thereafter, of any item of preservation, protection, maintenance, or repair, the need of which arose or which was created prior to such expiration or termination, and any unexpended portion of the maximum amount to be expended, as augmented, which is not, in the determination of the Government, required for the performance of Borg-Warner's obligations hereunder, shall be disposed of by Borg-Warner as the Government may otherwise direct.

ARTICLE 8. *Renegotiation Upon Renewal.* If Borg-Warner gives timely notice of extension under Article 3 hereof, both parties hereto shall have the right to renegotiate and have redetermined the obligations under Articles 6 and 7 hereof (hereinafter called the "obligations"), for such extended term. Either party hereto may serve notice on the other of its intention to demand such renegotiation and redetermination at any time prior to the 7th day of November of the year preceding the last calendar year of the then current five (5) year term; *provided*, that if neither party serves such notice on the other prior to such time, and Borg-Warner has given timely notice of extension under Article 3, the obligations during the then current term shall obtain for the extended term. If as of the 7th day of December of the year preceding the last calendar year of the then current five (5) year term the parties hereto have not agreed upon the obligations to obtain for the ensuing term, this lease, or any extension hereof, shall expire on the 7th day of March of the last calendar year of the then current term.

ARTICLE 9. *Proration.* Obligations under this lease relative to the payment of rent or the expenditure of moneys for maintenance, repair, protection and preservation shall be prorated in the event of termination (other than for default under Article 11(*d*) of this lease) at any time other than the beginning of a lease year.

ARTICLE 10. *Risk of Loss—Insurance.* (a) All risk of loss of or damage to the Facilities during the term of this lease, including but not limited to loss or damage caused by the failure of Borg-Warner to exercise due diligence in complying with the provisions of this lease, or by any other fault or negligence of Borg-Warner, its agents, servants or employees, shall be borne by Borg-Warner and Borg-Warner shall, upon demand and at the election of the Government, subject, however, to the provisions of paragraph (e) hereinbelow, either compensate the Government for such loss or damage or effect rebuilding, replacement or repair of such loss or damage; *Provided*, however, that Borg-Warner shall be liable for loss of or damage to the Facilities resulting from risks expressly required to be insured against hereunder only to the extent of insurance so required to be procured and maintained or to the extent of insurance actually procured and maintained, whichever shall be the greater; and *Provided, further*, that Borg-Warner shall not be liable for loss of or damage to the Facilities arising from causes beyond the control of Borg-Warner and not customarily covered by insurance in the locality in which NIRP is situated. It is understood and agreed that Borg-Warner shall have no risk of loss or damage with respect to the Government-owned machine tools, machinery and equipment stored in the Storage Area except to the extent that such loss thereof or damage thereto is attributable to the failure of Borg-Warner to exercise due diligence in complying with the provisions of Article 7 hereof, or to the negligence or other fault of Borg-Warner, its agents, servants or employees.

(b) Borg-Warner shall procure and maintain at its own expense, the following property damage insurance with respect to the Facilities, in amounts and types which may exceed but shall not be less than the minimum amounts and types hereinafter specified:

Property	Type	Minimum Amount
The Facilities, less Government-owned machinery, machine tools and equipment in the Storage Area.	Fire and Extended coverage	$700,000.00

(c) Borg-Warner shall procure and maintain at its expense, with respect to its use or maintenance of the Facilities, and with respect to its maintenance of the Government-owned machinery, machine tools and equipment stored in the Storage Area, for the protection of Borg-Warner and the Government as their respective interests may appear, third party bodily injury and property damage insurance in the following amounts: $200,000.00 for bodily injury to any one person and $500,000.00 for bodily injury to more than one person in any one accident, and $100,000.00 for property damage in any one accident.

(d) Except as otherwise specifically provided herein, all policies of insurance required by this lease to be carried by Borg-Warner under (b) and (c) above shall be in such form, for such periods of time, and with such insurers as the Department may from time to time reasonably require or approve, which approval may permit Borg-Warner to be a self-insurer in appropriate circumstances, and shall contain provision for thirty (30) days' prior notice to the Office of Naval Material, Insurance Branch, Washington 25, D. C., in the event of cancellation of the policy on the part of the insurer. A certificate of insurance or a certified copy of each policy of insurance required to be taken out under (b) and (c) above shall be deposited promptly with said Insurance Branch. Borg-Warner agrees that not less than thirty (30) days prior to the expiration of any insurance required to be carried by Borg-Warner under (b) and (c) above, it will deliver to said Insurance Branch a certificate of insurance or a certified copy of each renewal policy to cover the same risks. Borg-Warner agrees to comply with all warranties and conditions in all such policies. All insurance required or carried by Borg-Warner against loss or damage to any of the Facilities shall be for the protection of the Government and Borg-Warner against loss or damage to any of the Facilities shall be for the protection of the Government and Borg-Warner against their respective risks and liabilities in connection with the Facilities, and each such policy of insurance shall name Borg-Warner and the United States of America (Department of the Navy) as the insured and shall contain a loss payable clause reading substantially as follows: "Loss, if any, under this policy shall be ad-

insted with the Borg-Warner Corporation and the proceeds, at the direction of the Government, shall be payable to Borg-Warner Corporation, and proceeds not paid to Borg-Warner Corporation shall be payable to the Treasurer of the United States of America."

(e) In the event that any item or part of the Facilities shall require repair, rebuilding or replacement resulting from loss or damage the risk of which is required to be covered by insurance hereunder, Borg-Warner shall promptly give notice thereof to the Department. If the proceeds of any insurance covering such loss or damage are sufficient to permit the completion of such repair, rebuilding or replacement, and if such proceeds are not in excess of 30% of the amount applicable to fire and extended coverage insurance as set forth in paragraph (b) above, Borg-Warner shall effect such repair, rebuilding or replacement. If the proceeds of any insurance covering such loss or damage are not sufficient to permit the completion of such repair, rebuilding or replacement or if such proceeds exceed 30% of said amount set forth in paragraph (b), Borg-Warner shall effect such repair, rebuilding or replacement if (and, in case such proceeds exceed said percentage, to the extent) required so to do by the Department, and any excess of the cost of such repair, rebuilding or replacement over such insurance proceeds as are available shall be allowed as a credit against the maximum amount to be expended, referred to in Article 7 hereof, with respect to the lease year in which Borg-Warner shall have commenced such repair, rebuilding or replacement and any balance not so credited shall be credited against the maximum amount to be expended with respect to the succeeding lease year. If it appears that the sum of the maximum amount to be expended with
91 respect to the lease year in which Borg-Warner shall have commenced such repair, rebuilding or replacement and the maximum amount to be expended with respect to the succeeding lease year will not be sufficient to permit such excess cost to be credited in full against such sum, Borg-Warner shall not be required to effect such repair, rebuilding or replacement unless and until the Department shall have agreed that the cost thereof shall be reimbursed to Borg-Warner. In the event that

Borg-Warner shall have effected any repair, rebuilding or replacement which Borg-Warner is required to effect pursuant to this paragraph, the Contracting Officer shall direct the payment to Borg-Warner of so much of the proceeds of any insurance carried by Borg-Warner and made available to the Government on account of loss of or damage to any item or part of the Facilities as may be necessary to enable Borg-Warner to effect such repair, rebuilding or replacement. In the event that Borg-Warner shall not have been required to effect such repair, rebuilding or replacement, and if the insurance proceeds allocable to the loss or damage which has created the need for such repair, rebuilding or replacement have been paid to Borg-Warner, Borg-Warner shall promptly refund to the Government the amount of such proceeds.

(f) Notwithstanding anything in the foregoing, in the event of loss of or damage to the Facilities which is not occasioned by the fault or negligence of Borg-Warner or by any failure or refusal on its part to comply fully with its obligations under this lease, then (provided that the expense thereof does not exceed the Allowable Sum described below) Borg-Warner may effect any necessary repair, rebuilding or replacement of the Facilities, the expense of which is not covered by Borg-Warner's assumption of risk under paragraph (a) above, without authorization or requirement by the Department and the expense of such repair, rebuilding or replacement shall be allowed as a credit against the maximum amount to be expended. The Allowable Sum above referred to shall be the difference between (i) the maximum amount to be expended with respect to the lease year in which Borg-Warner shall have commenced such repair, rebuilding or replacement, as such amount may have been augmented pursuant to paragraph (e) of Article 7, and (ii) $18,000.00 (representing a minimum annual maintenance allowance) or the portion of that sum allocable to the part of the lease year remaining after Borg-Warner shall have commenced such repair, rebuilding or replacement.

ARTICLE 11. *Termination by the Government.* This lease may be terminated by the Department at any time prior to the expiration of the term hereof (including any extension of such term):

(a) Without prior notice, upon the declaration of a national emergency by the President or the Congress;

(b) Following notice of one hundred and twenty (120) days if the Secretary of the Navy shall determine that the interests of national defense so require;

92 (c) Upon one hundred and twenty (120) days' notice if (i) the Secretary shall have determined that the NIRP is surplus to the further needs and responsibilities of the Department and (ii) the Government shall thereafter have offered the NIRP for sale as surplus, and (iii) the notice provided for in Article 13 shall have been received by Borg-Warner and Borg-Warner shall have notified the Government that it does not desire to exercise its right of first refusal granted by Article 13, or the sixty (60) day period of said notice shall have expired without exercise by Borg-Warner of said right, *Provided, however*, that notwithstanding any notice of termination given pursuant to this subparagraph (c), this lease and all rights and obligations hereunder shall continue in full force and effect until sixty (60) days after Borg-Warner has received the notice provided for in Article 13 hereof, or until this lease has been terminated pursuant to any other provision hereof, or has expired by its own terms, whichever shall first occur.

(d) Following notice of twenty (20) days (i) if Borg-Warner shall have defaulted in the performance of any of its obligations hereunder and shall not have corrected such default within twenty (20) days after receipt of a notice from the Department specifying such default, or within such longer period of time as the Department may determine to be reasonable and appropriate under all the circumstances to permit Borg-Warner, acting with due diligence, to cure such default, *Provided, however*, that this lease shall not be terminable under the provisions of this subparagraph (d) and Borg-Warner shall not be charged with any liability to the Government therefor if the default of Borg-Warner in the perform-

ance of its obligations of preservation, protection, maintenance and repair of the Facilities under the terms of this lease are due to causes beyond the control and without the fault or negligence of Borg-Warner, such causes including but not being restricted to (1) Acts of God or the public enemy; (2) Acts of the Government or any State or political subdivision thereof, (3) Fires, floods, explosions, earth quakes, or other catastrophes, (4) Epidemics (5) Quarantine restrictions, (6) Strikes, (7) Freight embargoes, (8) Unusually severe weather, (9) Inability of Borg-Warner to obtain equipment or material due to the operation of Governmental priorities, preferences or allocations of equipment or material, or (10) Delays of a subcontractor or supplier in furnishing material or supplies owing to causes beyond the control and without the fault or negligence of Borg-Warner, unless Borg-Warner could reasonably have procured the materials or supplies from other sources; or (ii) in the event of a filing of a petition by or against Borg-Warner for adjudi-
93 cation as a bankrupt, for reorganization, or for arrangement within the meaning of the Bankruptcy Act as now or hereafter amended, and such petition remains undismissed for a period of sixty (60) days or in the event of the appointment of a receiver or trustee of the property of Borg-Warner.

In the event of termination under this subparagraph (d), the Department shall have the immediate right to re-enter and resume possession of the Facilities and to remove all persons and property therefrom and such re-entry shall not be deemed an acceptance of a surrender of this lease. In the event of such termination, the Departmnt may, at its election, relet the whole or any portion of the Facilities for any period, equal to, greater than, or less than the remainder of the term of this lease to any person, for any sum and upon any terms deemed by the Department to be reasonable and satisfactory.

In the event of termination under this subparagraph (d) and whether or not the Facilities shall have

been relet, the Department shall be entitled to recover and Borg-Warner shall pay to the Department (I) the cost to it of resuming possession of the Facilities, (II) the cost to it of performing Borg-Warner's obligations hereunder of restoring, renovating, replacing, or repairing all or any part of the Facilities to their condition at the inception of this lease, reasonable wear and tear and loss or damage for which Borg-Warner is not responsible hereunder, excepted; (III) the cost to it of performing any other covenant on the part of Borg-Warner to be performed hereunder, and (IV) an amount equal to the aggregate of all rent reserved hereunder and not theretofore paid, less the net rent, if any, collected by the Department on reletting the Facilities, which amounts shall be due and payable by Borg-Warner at the times on which the rent reserved under this lease would have become due and payable.

At its election and in lieu of terminating this lease pursuant to this subparagraph (d), the Department may perform or cause said defaulted obligations to be performed for the account and at the expense of Borg-Warner, in which event Borg-Warner shall pay to the Department the cost to the Department of performing or causing said obligations to be performed.

ARTICLE 12. *Termination by Borg-Warner.* This lease may be terminated by Borg-Warner at any time prior to the expiration of the term hereof, or any renewal thereof, upon thirty (30) days written notice to the Department in the event of damage or destruction of all or a substantial part of the Facilities so as to render all of the Facilities incapable for use for the purpose for which they are leased hereunder or in the event of damage to or destruction of any complete item of the Facilities without which the Facilities could not be operated by Borg-Warner for such purposes, *provided,*

(i) such damage or destruction is

(a) occasioned by a risk not in fact covered and not customarily covered by insurance in the locality in which the Facilities are located, or

(b) occasioned by a risk which is expressly required to be covered by insurance hereunder and the
94 amount required to repair, rebuild or replace the loss or damage so as to render the Facilities or such essential item thereof fit for use for the purposes for which leased hereunder exceeds the amount of insurance required hereunder or actually procured and maintained with respect to such risk (whichever shall be greater), or

(c) occasioned by a risk which is insured against in compliance with the terms of this lease and the applicable insurance proceeds are sufficient to permit the completion of the repair, rebuilding or replacement of the loss or damage but such proceeds exceed thirty percent (30%) of the amount applicable to fire and extended coverage insurance as set forth in subparagraph (b) of Article 10.

and the Department either has not authorized or directed the repair, rebuilding or replacement of the Facilities, so as to render them fit as aforesaid, or does not make provision for payment for such repair, rebuilding or replacement by the application of insurance proceeds or otherwise, and

(ii) such damage or destruction is not occasioned by the fault or negligence of Borg-Warner or by any failure or refusal on its part fully to comply with its obligations hereunder.

Notwithstanding anything in the foregoing, it is understood and agreed that in the event of loss or damage with respect to which Borg-Warner shall have the right under paragraph (f) of Article 10 to repair, rebuild or replace without authorization or requirement by the Government, Borg-Warner's right of termination under this Article shall arise only if, upon the expiration of ninety (90) days after receipt by the Department of notice from Borg-

Warner that the cost of the repair, rebuilding or replacement required to render the Facilities or essential item thereof aforesaid fit for use for the purposes for which leased hereunder exceeds the allowable sum referred to in paragraph (f) of Article 10 plus the proceeds of insurance (if any) covering the loss or damage, the Department fails to authorize or direct the necessary repair, rebuilding, or replacement or to make provision for payment therefor; and said right of termination shall exist for thirty (30) days after so arising.

ARTICLE 13. *Right of First Refusal.* If the Secretary shall have determined that the Facilities or the major portion thereof are surplus to the needs and responsibilities of the Department and the Government shall thereafter offer the Facilities or the major portion thereof for sale as surplus, Borg-Warner shall have the right, within sixty (60) days after receipt of appropriate notice from the Government (and provided that this lease shall not, prior to the expiration of said sixty (60) days, have expired, or terminated by virtue of notice pursuant to paragraphs (a), (b), or (d) of Article 11 hereof) to purchase the Facilities or the portion thereof offered for sale as aforesaid upon the same terms and at the same price as contained in the best offer thereof received by and acceptable to the Government.

ARTICLE 14. *Taxation.* In the event that as a result of any future Act of Congress subjecting Government-owned property to taxation, taxes, assessments, or similar charges are imposed by state or local authorities upon the property leased hereunder (other than upon Borg-Warner's possessory interest therein), Borg-Warner shall pay
95 the same when due and payable and this lease shall be renegotiated so as to accomplish an equitable reduction in the rental provided for herein, which reduction shall not be greater than the amount of such taxes, assessments, or similar charges, *provided,* that, in the event that the parties hereto are unable to agree, within ninety (90) days from the date of the imposition of such taxes, assessments, or similar charges, on a rental which, in the opinion of the Contracting Officer, constitutes a reasonable return to the Government on the leased property,

then, in such event, the Contracting Officer shall have the right to determine the amount of the rental, which determination shall be binding on Borg-Warner, subject to appeal in accordance with Article 19(g) of this lease.

ARTICLE 15. *Alterations and Improvements.*

(a) *Consent* (i) Borg-Warner shall have the right at its own cost and expense and without the prior consent of the Department to make non-structural and minor additions, alterations and improvements to the leased premises, to attach or erect temporary signs or easily removable fixtures in and upon the premises and to install, arrange and rearrange in and upon the premises readily removable machinery, equipment and facilities belonging to Borg-Warner.

(ii) Borg-Warner at its own cost and expense shall also have the right to make substantial or structural additions, improvements and alterations to the leased premises *Provided,* however, that in each case the consent of the Department thereto is first obtained. The Department expressly reserves the right to make it a condition of such consent that any or all of such additions, improvements or alterations shall be removed upon expiration or termination of this lease and the Facilities affected thereby be restored to the same or as good condition as at the inception of this lease.

(iii) It is expressly agreed and understood that Borg-Warner shall have the right, at its own cost and expense, to erect a steel smokestack necessary for the operation of the power house at the NIRP. The Department, however, reserves the right to require that, upon expiration or termination of this lease or of any renewal hereof, Borg-Warner shall, at its own cost and expense, remove the smokestack and perform such restoration of the Facilities affected by such removal as the Department may require. It is further expressly agreed and understood that Borg-Warner shall have the right to make such alterations of and repairs to the boilers, and to make such alterations to and modifications of the utility lines, service lines and other similar items of the Facilities as may be necessary to place the premises in satisfactory condition for the installation and operation of Borg-Warner's machinery.

(b) *Title.* Title to the additions, alterations, improvements, and all other property described in paragraph (a)(i) of this Article shall remain in Borg-Warner, subject, however, to the provisions of Article 16. If, as provided in paragraph (a) (ii) of this Article, the Department shall, as a condition of its consent to their installation, require removal of any of such additions, improvements and alterations, title to any and all such additions, improvements and alterations so required to be removed, shall remain in Borg-Warner. Title to all other alterations, additions and improvements within the meaning of paragraph (a)(ii) of this Article, shall vest in the Government when annexed to or installed on the Facilities. Title to all repairs to the Facilities and to replacements of any portions thereof, including repairs to and replacements of all additions, alterations and improvements, except those owned by Borg-Warner, shall be in the Government.

(c) *Liens.* Borg-Warner shall not do or suffer anything to be done upon or in connection with the premises which may subject the Facilities or any part thereof to any liens or rights, *in rem*, and shall promptly discharge, or cause to be discharged, any lien or right *in rem*, of any kind other than one in favor of the Government, which shall at any time arise or exist with respect to the Facilities or to any alterations, additions, betterments or modifications thereto.

ARTICLE 16. *Removal, Restoration and Surrender:* (a) Except as may be expressly provided elsewhere in this lease, upon the expiration or termination of this lease, or any renewal hereof, Borg-Warner, at its own cost and expense,

(i) shall remove from the *Facilities* all alterations, additions, improvements, and all other property installed pursuant to the provisions of paragraph (a)(i) of Article 15, unless the Department shall consent to their abandonment;

(ii) shall remove from the Facilities all such alterations, additions and improvements, title to which is in Borg-Warner, installed pursuant to the Depart-

ment's consent under paragraph (a)(ii) of Article 15.

(iii) shall, if and to the extent required by the Department, replace and reinstall in the Manufacturing Area all Government-owned machine tools, equipment and material stored in the Storage Area in accordance with Exhibit "B" attached hereto, entitled "Machine Tool Layout Plan", including the making of such electrical and piping connections as are requested to restore such equipment to its operable condition at the inception of this lease;

(iv) shall, if and to the extent required by the department, replace, rearrange and reinstall all utility lines and service lines modified in accordance with paragraph (a)(iii) of Article 15 hereof, and perform such other acts as are necessary to restore the Facilities to substantially the same condition in all respects as said Facilities were in at the inception of this lease, including (without limitation) restoration of portions of the Facilities affected by the removal of additions, alterations or improvements or other property described in paragraph (a) of Article 15; and

97 (v) upon completion of the foregoing, shall surrender and peaceably vacate the Facilities.

(b) The Government shall, within sixty (60) days before the expiration of this lease (including any extension of the term hereof) or its termination by virtue of notice under Article 10(b) or Article 10(c), or within a reasonable time after termination hereof by virtue of notice under Article 10 (a), notify Borg-Warner of the extent of restoration required by the Government; *Provided*, however, that failure of the Government to give such notice within said times shall not relieve Borg-Warner of its obligations under paragraph (a) of this Article. If and after such notice is given by the Government, Borg-Warner shall not be subject to further requirements for restoration not included in such notice. In the event the Government gives such notice within the applicable time aforesaid, all obligations of Borg-Warner under this lease

(other than the performance of items of long-term maintenance and the payment of cash rent) shall continue in effect until Borg-Warner has completed its obligations under paragraph (a) of this Article, notwithstanding earlier ending of the term of this lease by reason of expiration or termination.

(c) During the period during which Borg-Warner is undertaking restoration, the Government shall progressively inspect such restoration in order to facilitate final approval of such restoration as hereinbelow provided. Within thirty (30) days after Borg-Warner has completed all items of restoration necessary or as directed by the Government, the Government shall, upon an inspection of the premises, and determination of satisfactory discharge of Borg-Warner's obligations of restoration, execute a release of Borg-Warner's obligations relative thereto.

ARTICLE 17. *Representations.* Borg-Warner has examined and knows the condition and state of repair of the Facilities as of the date first above written, accepts them as such and hereby acknowledges that the Government has made no agreement or promise to alter, improve, adapt or repair any of the Facilities or any part thereof during the term hereof. Borg-Warner acknowledges further that no representations concerning the condition or state of repair of any item of the Facilities, or part thereof, have been made by the Government prior to or at the time of the execution of this lease which are not set forth herein and further that this lease contains all the agreements made between the parties hereto.

ARTICLE 18. *Indemnification.* Borg-Warner shall indemnify and save and hold harmless the Government, its officers, agents and employees of and from any and all liability incurred as the result of any breach by Borg-Warner, its agents, servants, employees, invitees or licensees of any covenant or condition of this lease, or as the result of Borg-Warner's occupancy or use of the Facilities and whether or not occasioned by the negligence or lack of diligence of Borg-Warner, its agents, officers, servants or employees.

ARTICLE 19. *General Provisions.* (a) All uranium, thorium, and all other materials determined pursuant to

section 5(b)(1) of the Atomic Energy Act of 1946 (60 Stat. 761) to be peculiarly essential to the production of fissionable material, contained, in whatever concentration, in deposits in the Facilities are hereby reserved for the use of the United States, together with the right of the United States through its authorized agents or representatives at any time to enter upon the land and prospect for, mine, and remove the same without payment of compensation for damage or otherwise. However, the Facilities may be used, and any rights otherwise acquired by this lease may be exercised, as if no reservation of such materials had been made; except that, when such use
98 results in the extraction of any such material from the land in quantities which may not be transferred or delivered without a license under the Atomic Energy Act of 1946, as it now exists or may hereafter be amended, such material shall be the property of the United States Atomic Energy Commission, and the Commission may require delivery of such material to it by any possessor thereof after such material has been separated as such from the ores in which it was contained. If the Commission required the delivery of such material to it, it shall pay to the person mining or extracting the same, or to such other person as the Commission determines to be entitled thereto, such sums, including profits, as the Commission deems fair and reasonable for the discovery, mining, development, production, extraction, and other services performed with respect to such material prior to such delivery, but such payment shall not include any amount on account of the value of such material before removal from its place of deposit in nature. If the Commission does not require delivery of such material to it, the reservation hereby made shall be of no further force or effect.

(b) *Failure of Government to Insist on Compliance.* The failure of the Government to insist, in any one or more instances, upon performance of any of the terms, covenants or conditions of this lease shall not be construed as a waiver or relinquishment of the Government's right to the future performance of any such terms, covenants or conditions and Borg-Warner's obligations in respect of such future performance shall continue in full force and effect, and the receipt and acceptance of rent

shall not be deemed to be a waiver of any breach or default by Borg-Warner of any provision of this lease nor shall it invalidate or impair the efficacy of any termination or notice of termination hereunder unless expressly so agreed in writing by the Department.

(c) *Records.* (1) Borg-Warner shall keep adequate records and books of account showing the actual cost of all items of labor, material, equipment, supplies, services and other direct expenditures made in the performance of Borg-Warner's obligations under Article 7 hereof. The method of accounting employed by Borg-Warner shall be subject to the approval of the Department but no material change will be made therein if the same conforms to good accounting practices and is sufficient for the purposes of this lease.

(ii) The Department shall, at all reasonable times, be afforded proper facilities for inspecting the records and books of account pertaining to this lease and shall, at all reasonable times have access thereto for such purposes. All information obtained from said records and books of account shall be deemed confidential.

(d) *Transfer of Contract.* Neither this lease nor any interest herein shall be transferred or assigned by Borg-Warner, either voluntarily or by operation of law, except with the written consent of the Department nor shall any item of the Facilities or part thereof be subleased or otherwise made available by Borg-Warner to any third party or parties without such written consent.

(e) *Covenant against Contingent Fees.* Borg-Warner warrants that it has not employed any person to solicit or secure this lease upon any agreement for a commission, percentage, brokerage or contingent fee. Breach of this warranty shall give the Government the right to annul this lease, or in its discretion, to recover from Borg-Warner the amount of such commission, percentage, brokerage or contingent fee in addition to the consideration herein set forth. This warranty shall not apply to commissions payable by Borg-Warner upon contracts or sales secured or made through *bona fide* established commercial or selling agencies maintained by Borg-Warner for the purpose of securing business.

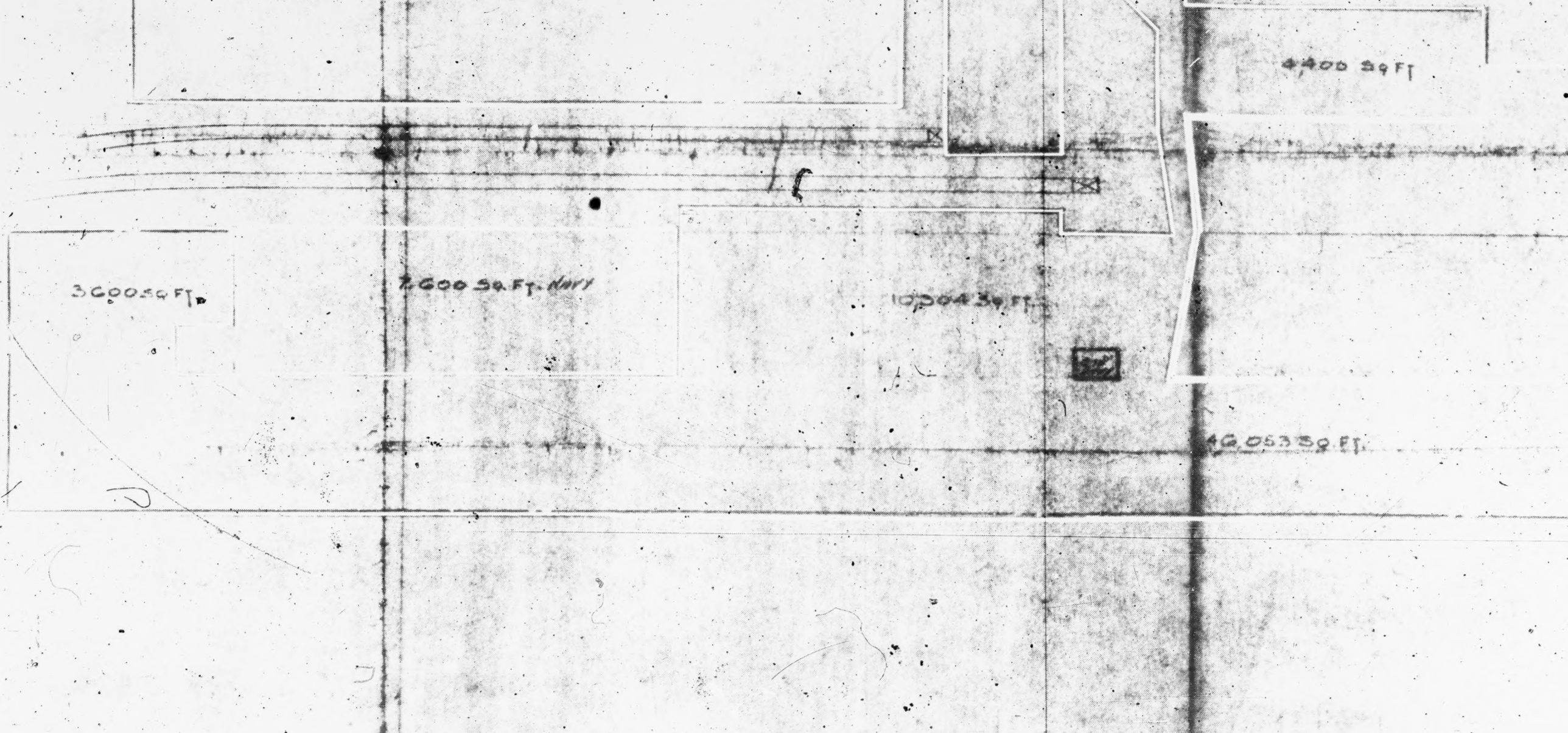
99 (f) *Officials Not to Benefit.* No Member of or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this lease or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this lease if made with a corporation for its general benefit.

(g) *Disputes.* Except as otherwise specifically provided herein, all disputes concerning questions of fact arising under this lease shall be decided by the Chief of the Bureau of Yards and Docks or his duly authorized representative, subject to written appeal to the Secretary or his duly authorized representative by Borg-Warner within thirty (30) days after receipt by Borg-Warner of the written decision of the Chief of the Bureau of Yards and Docks. The decision of the Secretary or his duly authorized representative will be final and conclusive upon the parties hereto. The existence or pendency of any dispute shall not excuse Borg-Warner from the continued performance of its obligations hereunder.

(h) *Definition of "Department".* "Department", as used in this lease, shall mean the Secretary of the Navy, the Chief of the Bureau of Yards and Docks, the Officer in Charge of this lease, and such other duly authorized representative or representatives as the Secretary or the Chief of the Bureau of Yards and Docks may designate from time to time.

(i) *Labor Provisions.* (i) Borg-Warner shall not employ in the performance of any work required to be performed under this lease, any person undergoing sentence of imprisonment at hard labor;

(ii) No laborer or mechanic doing any part of the work required to be performed under this lease, in the employ of Borg-Warner or any subcontractor contracting for any part of said work, shall be required or permitted to work more than eight hours in any one calendar day upon such work, wherever performed, except upon the condition that compensation is paid to such laborer or mechanic in accordance with the provisions of this subparagraph (ii). The wages of every laborer and mechanic employed by Borg-Warner or any subcontractor engaged in the per-


4,400 Sq Ft
3C,005q Ft
7,600 Sq.Ft. Navy
10,204 Sq Ft
40,053 Sq Ft

30,520 sq ft

ORIGINAL BLG. 16
" 30
SECOND ADDITION
THIRD "
PICKLING BLG.

TOTAL CU FT.

4,400 SQ FT

ORIGINAL BLG. 16 TO CEILING 675,000 CU FT
" 30 " 1,350,000 "
SECOND ADDITION 536,000 "
THIRD " 430,000 "
PICKLING BLG. 19,000 "

TOTAL CU FT. 3,010,000

4,400 SQ FT

30 520
4,190
10,381
3,600
16,053
74,877

4,400 SQ FT

48,176 SQ FT. NAVY

46,053 SQ. FT.

Defendants Exhibit 2

Form C of D-11-50

WARD _____

CITY OF DETROIT

PERSONAL PROPERTY ASSESSMENT ROLL

1954

LINE	REGISTERED MAIL NOTICE NUMBER	FIELD BOOK PAGE	ITEM NUMBER	OWNER OR TAXPAYER / ADDRESS	BUSINESS AND SALES TAX NUMBER	ASSESSMENT 1953	ASSESSMENT 1954	CHECK	STATEMENT FILED	ACCEPTED OR NOT ACCEPTED	FIELD APPRAISER	TRUE AND LAWFUL ASSESSMENT DETERMINED BY THE STATE TAX COMMISSION
1				BORG-WARNER, DET GEAR 11111 FRENCH RD MAIL 12345 KERCHEVAL	LEASED ACT LAND 189 BLDG PA 1953		352,060					
2				FELDMAN, MITCHELL 905 FARMER MAIL - 2709 CADILLAC TOWER	ACT LEASED 189 LAND PA 1953		12230					
3				HOUSTON HAYES LAND CO COR. KELLY & WHITTIER MAIL 815 HAMMOND BLDG	LEASED ACT LAND 189 PA 1953		~~12,350~~ ~~8240~~ 500			B. of R. ID. & Pet. No. ~~8240~~ 8240		
4												
5				JEFFERSON CORP, FORMERLY MC CARTHY ROOT CORP 4300 W JEFFERSON	LEASED ACT LAND 189 BLDG PA 1953		690,770					

LINE	REGISTERED MAIL NOTICE NUMBER	FIELD BOOK PAGE	ITEM NUMBER	OWNER OR TAXPAYER / ADDRESS	BUSINESS AND SALES TAX NUMBER	ASSESSMENT 1953	ASSESSMENT 1954	CHECK	STATEMENT FILED	ACCEPTED OR NOT ACCEPTED	FIELD APPRAISER	TRUE AND LAWFUL ASSESSMENT DETERMINED BY THE STATE TAX COMMISSION
4												
5				JEFFERSON CORP, FORMERLY MC CARTHY ROOT CORP 4300 W JEFFERSON DETROIT 9, MICH	LEASED ACT LAND 189 BLDG PA 1953		690,770					
6												
7				FELDMAN, MITCHELL ~~SILLOWAY & CO~~ 905 FARMER MAIL 840 BURL BLDG	LEASED ACT LAND 189 PA 1953		~~12,230~~					
8												
9												
10												

108

formance of work required under this lease shall be computed on a basic day rate of eight hours per day and work in excess of eight hours per day is permitted only upon the condition that every such laborer and mechanic shall be compensated for all hours worked in excess of eight hours per day at not less than one and one-half times the basic rate of pay. For each violation of the requirements of this subparagraph (ii) a penalty of *Five Dollars* ($5.00) shall be imposed upon Borg-Warner for each laborer or mechanic for every calendar day in which such employee is required or permitted to labor more than eight hours upon said work without receiving compensation computed in accordance with this subparagraph (ii), and all penalties thus imposed shall be withheld for the use and benefit of the Government; Provided, that this stipulation shall be subject in all respects to the exceptions and provisions of the Act of June 19, 1912 (U.S. Code, Title 40, Sections 324 and 325) relating to hours of labor, as modified by the provisions of Section 303 of Public Law No. 781, 76th Congress, approved September 9, 1940, relating to compensation for overtime; and

(iii) Borg-Warner, in performing the work required to be performed under this lease, shall not discriminate against any employee or applicant for employment because of race, creed, color or national origin. All subcontracts made under this lease shall contain similar provisions. For the purpose of this Article, subcontracts shall be deemed to include all purchase orders and agreements to perform all of any part of the work, or to make or furnish any article required for the performance of work to be performed under this lease, except purchase orders or agreements for the furnishing of standard commercial articles or raw materials.

(j) *Notices.* No notice, order, direction, determination, requirement, consent or approval under this lease shall be of any effect unless in writing.

(k) *Exhibits.* The Exhibits attached hereto and all matters contained therein are hereby made a part of, and incorporated in, this lease.

ARTICLE 20. *Survival.* This lease shall be binding upon the Lessee, its successors, and assigns.

ARTICLE 21. *Letter of Intent Terminated.* Letter of Intent dated March 8, 1948, as modified by letter of June 4, 1948 and by letter of December 13, 1948, is hereby terminated and superseded in its entirety.

ARTICLE 22. *Administration.* The administration of this lease will be under the general direction of the Chief of the Bureau of Yards and Docks, known as the "Contracting Officer". The Contracting Officer shall designate an officer of the Civil Engineer Corps, United States Navy, or other representative of the Department as Officer in Charge of Contract, who shall, under the direction of the Contracting Officer, have complete charge of the administration of this lease and shall exercise full supervision and general direction of this lease, so far as it affects the interest of the Department.

IN WITNESS WHEREOF, the parties hereto have, on the respective dates set forth below, duly executed this lease as of the day and year first above written.

14 August 1950

UNITED STATES OF AMERICA

By Jack E. Cochrane
By direction of the Chief of the Bureau of Yards and Docks, acting under the direction of the Secretary of the Navy.

7 August 1950

BORG-WARNER CORPORATION

By H. E. Blood
Title Vice-Pres.

101 I, R. W. Dosé, certify that I am Secretary of the corporation named as Lessee herein, that H. E. Blood who executed this lease on behalf of the Lessee was then Vice President of said corporation; that this lease was duly signed for and on behalf of said corporation by authority of its governing body and is within the scope of its corporate powers.

R. W. Dosé
Secretary

(CORPORATE SEAL)

102 STATE OF ILLINOIS
COUNTY OF COOK ss.

The undersigned, R. W. Dosé, hereby certifies that he is Secretary of Borg-Warner Corporation, a corporation duly organized and existing under the laws of the State of Illinois, with its office in the City of Chicago, Illinois, and as such Secretary has the custody of all records, minutes and proceedings of the Board of Directors of said corporation.

The undersigned further certifies that at a meeting of the Board of Directors of Borg-Warner Corporation, held in the conference room of the corporation on the 16th floor of 310 South Michigan Avenue, Chicago, Illinois, on Friday, August 4, 1950, at 2:00 P. M., at which meeting a quorum of the directors of said corporation was present, the following resolution was duly adopted:

> WHEREAS, the Board of Directors has previously approved the negotiation of Lease No. NOy(R)-60040 with the United States of America acting through the Department of the Navy, covering a Naval Industrial Reserve Plant; formerly known as Clayton & Lambert Manufacturing Company, located at 11111 French Road, Detroit, Michigan, as covered by a Letter of Intent, dated March 8, 1948, modified June 4, 1948 and December 13, 1948, and a definitive lease has now been prepared covering the terms and conditions thereof, clarifying the terms of said lease as set forth in the Letters of Intent.
>
> NOW, THEREFORE, BE IT RESOLVED, that H. E. Blood, Vice President, be and he is hereby authorized to execute such lease as of March 8, 1948, and R. W. Dosé, as Secretary, is hereby authorized to attest to the same.

IN WITNESS WHEREOF, the undersigned has hereunto subscribed his name as Secretary of Borg-Warner Corporation and has affixed hereto the seal of said corporation this 7th day of August, 1950.

R. W. Dosé
Secretary
Borg-Warner Corporation

(CORPORATE SEAL)

104 **Co-plaintiffs' Exhibit "B"**

FIRST AMENDMENT TO LEASE NOy(R)-60040

between

THE UNITED STATES OF AMERICA

and

BORG-WARNER CORPORATION

THIS AGREEMENT, made and entered into as of the 1st day of December 1952, between THE UNITED STATES OF AMERICA (hereinafter called the "Government"), represented by the Contracting Officer executing this Agreement, and BORG-WARNER CORPORATION (hereinafter called "Borg-Warner"), a corporation organized and existing under the laws of the State of Illinois, whose address is 310 South Michigan Avenue, Chicago 4, Illinois;

WITNESSETH:

WHEREAS, by Lease Contract NOy(R)-60040, in full force and effect between the parties hereto, the Government leased to Borg-Warner the Naval Industrial Reserve Plant, formerly known as Clayton and Lambert Manufacturing Company, located at 11111 French Road, Detroit, Michigan, for a period of five (5) years, commencing on 8 March 1948 and ending on 7 March 1953, with an option to extend this term for three (3) additional terms of five (5) years each; and

WHEREAS, Borg-Warner has given the Government timely notice of its election to extend the term of Lease Contract NOy(R)-60040 for an additional period of five (5) years commencing March 8, 1953, pursuant to the provisions of Article 3 of the contract, and the Government has given Borg-Warner timely notice of its intention to demand renegotiation and redetermination of the terms and conditions to obtain under the lease contract during the extended term, pursuant to the provisions of Article 8 of the contract, and the parties have heretofore agreed on the terms and conditions to obtain under the lease during the five (5) year period commencing March 8, 1953.

105 NOW THEREFORE, in consideration of the premises, and of the benefits and advantages to be derived therefrom, the parties hereto do hereby mutually agree that Lease Contract NOy(R)-60040 be and is hereby amended, effective March 8, 1953, in the following respects:

1. Strike out ARTICLE 3. *Term*, and substitute in lieu thereof the following:

> "ARTICLE 3. *Term*. The term of this lease shall be extended for a period of five (5) years, commencing on the 8th day of March, 1953, and ending on the 7th day of March, 1958, unless sooner terminated as herein provided. Borg-Warner shall have the option to extend the term hereof for two (2) additional terms of five (5) years each, by giving not less than two hundred and seventy (270) days written notice to the Department prior to the expiration of the term of this lease, subject to the conditions of Article 8."

2. Add the following sentence to ARTICLE 4. *Adaption of Facilities*:

> "Borg-Warner shall, at its own cost and expense, and not as a charge against the maximum amount agreed to be expended for maintenance as provided in ARTICLE 7 of this lease contract, heat the space at the subject Plant, which is retained by the Government, in accordance with standard factory practice and to the same extent that Borg-Warner heats that portion of the premises leased during periods of its normal production."

3. Strike out ARTICLE 6. *Rent*, and substitute in lieu thereof the following:

> "ARTICLE 6. *Rent*. (a) Borg-Warner shall upon execution of this first amendment to Lease Contract NOy(R)-60040, pay to the Government as additional cash rent for first five (5) years of the term of the lease beginning March 8, 1948, and ending March 7, 1953, the sum of Forty-four Thousand Nine Hundred and Sixty-six Dollars and Sixty-four Cents ($44,966.64), representing the unexpended portion of the

maximum amount to be expended for maintenance, all as provided in ARTICLE 7 of this lease contract.

(b) Borg-Warner shall pay as rent for the Facilities, the sum of Twenty-four Thousand ($24,000.00) Dollars per annum, payable monthly in advance for the year commencing March 8, 1953, and terminating March 7, 1954, and thereafter payable semi-annually (first payment due September 8, 1954), for the period commencing March 8, 1954, and ending March 7, 1958, *Provided, however,* that if additional space is added to the manufacturing area by the removal of Government-owned materials stored in the storage area as provided for herein in ARTICLE 4, Borg-Warner shall pay additional rent therefor at the rate of seventy
106 (70¢) cents per square foot per annum, payable semi-annually, and,

Provided, further, that, effective March 8, 1954, and throughout the remaining term of the extended lease, Borg-Warner shall deduct and pay from the stipulated semi-annual rental installments any taxes assessed against it under the provisions of Public Act 189 of the State of Michigan for the year 1953 or other taxation statutes coming into effect during the extended term of the lease and which attempt to tax Borg-Warner on the basis of the assessed value of the Facilities leased to it or on the basis of the value of its leasehold interest therein or for any other reason because of its use and occupancy of the same under this lease. Borg-Warner will pay the personal taxes assessed against its own property located in said Facilities. The Government reserves the right to contest the legality of said Public Act 189 or any other of such described taxation statutes coming into effect during the extended term of the within lease, and, should it successfully do so, Borg-Warner shall repay to the Government any taxes actually refunded by such determination. Borg-Warner agrees to cooperate with the Government in respect to such possible litigation, including the payment of such taxes under protest, if so required by the Government.

(c) Cash payments provided for in this ARTICLE 6 shall be by certified check, payable to the Treasurer of the United States, delivered to the Officer in Charge of this Contract for transmittal to the Officer in Charge, U. S. Navy Regional Accounts Office, Washington 25, D. C."

4. Strike out paragraph (b) of ARTICLE 7. *Maintenance*, and substitute in lieu thereof the following:

"(b) In complying with this Article, Borg-Warner shall not (except as provided in (c) hereinbelow), be obligated to expend with respect to the items listed in paragraph (c) hereinbelow, a sum in excess of Thirty-five Thousand ($35,000.00) Dollars per annum, such amount being hereinafter referred to as the "maximum amount to be expended."

5. Strike out subparagraph (i) of paragraph (c) of ARTICLE 7. *Maintenance.*

6. Strike out paragraph (b) of ARTICLE 10. *Risk of Loss—Insurance*, and substitute in lieu thereof the following:

"(b) Borg-Warner shall procure and maintain at its own expense, the following property damage insurance with respect to the Facilities, in amounts and types which may exceed but shall not be less than the minimum amounts and types hereinafter specified:

Property	Type	Minimum Amount
The Facilities, less Government-owned machinery, machine tools and equipment in the Storage Area.	Fire and extended coverage	$1,000,000.00"

7. Except as herein amended, all other terms and conditions of Lease Contract NOy(R)-60040 shall be and remain in full force and effect.

IN WITNESS WHEREOF, the parties hereto have, on the respective dates set forth below, duly executed this First

Amendment to Lease Contract NOy(R)-60040 as of the day and year first above written.

THE UNITED STATES OF AMERICA

Date 3 March, 1954 By Jack E. Cochrane
By direction of the Chief of the Bureau of Yards and Docks, acting under the direction of the Secretary of the Navy.

BORG-WARNER CORPORATION

By L. G. Porter
Title Vice-President

Approved
/s/ R. N. Murphy
Date February 23, 1954

I, H. H. Gehlbach, certify that I am an Assistant Secretary of the corporation named as Lessee herein, that L. G. Porter who executed this First Amendment to Lease Contract NOy(R)-60040 on behalf of the Lessee was then a Vice-President of said corporation; that this lease was duly signed for and on behalf of said corporation by authority of its governing body and is within the scope of its corporate powers.

By H. H. Gehlbach
(CORPORATE SEAL) Title Assistant Secretary

Note

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Page 97 is the large form immediately above this frame.

109 [Clerk's Certificate to foregoing omitted in printing.]

110 SUPREME COURT OF THE UNITED STATES

No. 487

October Term, 1956

(Title omitted)

APPEAL from the Supreme Court of the State of Michigan.

Order Noting Probable Jurisdiction—January 14, 1957

The statement of jurisdiction in this case having been submitted and considerd by the Court, probable jurisdiction is noted. The case is consolidated with Nos. 401, 564 (and 565) and 563 and a total of three hours allowed for oral argument.